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(SHOW) PROCEEDINGS AND ORDERS DATE: 0310

CASE NBR 85-1-00337 CFH
SHORT TITLE Kemp, Warden DOCKETED: Aug 27 198
VERSUS Potts, Jack

Date	Proceedings and Orders
Aug 27 1985	Petition for writ of certiorari filed.
Sep 30 1985	Brief of respondent in opposition filed.
Sep 30 1985	Motion of respondent for leave to proceed in forma pauperis filed.
Oct 2 1985	DISTRIBUTED. October 18, 1985
Oct 16 1985	Record requested.
Oct 19 1985	Record filed.
Oct 19 1985	Certified original record. 2 volumes. supp. record on appeal. 13 volumes & C.A. proceedings received.
Nov 6 1985	REDISTRIBUTED. November 27. 1985
Nov 6 1985	REDISTRIBUTED. November 27. 1985
Dec 4 1985	REDISTRIBUTED. January 10, 1986
Jan 13 1986	REDISTRIBUTED. January 17. 1986
Jan 13 1986	REDISTRIBUTED. January 17. 1986
Feb 7 1986	REDISTRIBUTED. February 21,1986.

CONTINUE (

PROCEEDINGS AND ORDERS DATE: 0310

CASE NBR 85-1-00337 CFH
SHORT TITLE Kemp, Warden DOCKETED: Aug 27 19
VERSUS Potts, Jack

Date	Proceedings and Orders
Mar 3 1986	REDISTRIBUTED. March 7. 1986
Mar 3 1986	REDISTRIBUTED. March 7. 1986
Mar 10 1986	Motion of respondent for leave to proceed in forma pauperis GRANTED. Justice Brennan OUT.
Mar 10 1986	Petition DENIED. Dissenting opinion by The Chief Justice, with whom Justice Rehnquist joins. (Detached opinion.) Justice Brennan OUT.

****

PETITION FOR WRIT OF CERTIORARI

85-337

No. .....

In The

Supreme Court of the United States

October Term, 1984

RALPH KEMP, WARDEN,

Petitioner,

v.

JACK HOWARD POTTS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether in light of this Court's decisions in *Sanders v. United States,* 373 U.S. 1 (1963) and *Price v. Johnston,* 334 U.S. 266 (1948), the State has the burden of proving misconduct on the part of a state prisoner seeking federal habeas corpus relief in a successive petition filed pursuant to 28 U.S.C. § 2254, or whether in fact, it is the burden of a petitioner to establish excuse or justification, prior to a determination by the district court that a successive petition should be heard on its merits?

2.

Whether a trial court, having read the language of the indictment to the jury and having defined all the basic offenses alleged therein, must specifically charge the jury on the various grades of these offenses in order for the jury's finding that a defendant was guilty of a specific count of the indictment to be constitutional?

3.

Whether alleged improprieties during the argument of the prosecutor at the sentencing phase of the instant case, even if impermissible under state law, rise to the level of an error of constitutional dimension, if properly considered in light of the facts of the particular case and the prosecutor's argument, viewed as a whole?

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In The

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioner, Ralph Kemp, respectfully prays that the writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals entered in this action on May 29, 1984 and June 21, 1985.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported in *Potts v. Zant*, 734 F.2d 526 (11th Cir. 1984). (Appendix A). The decision

of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's petition for rehearing and suggestion for rehearing *en banc* was entered on June 21, 1985. (Appendix B). The Opinion of the district court granting federal habeas corpus relief to the Respondent is reported in *Potts v. Zant*, 575 F.Supp. 374 (N.D. Ga. 1983). (Appendix C). The opinion of the United States Court of Appeals for the Fifth Circuit remanding Respondent's case to the district court for a determination of the abuse of the writ issue is reported in *Potts v. Zant*, 638 F.2d 527 (5th Cir. Unit B), *cert. denied* 454 U.S. 877 (1981). (Appendix D).

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on May 29, 1984. *Potts v. Zant*, 734 F.2d 526 (11th Cir. 1984). (Appendix A). A petition for rehearing and suggestion for rehearing en banc were denied on June 21, 1985. (Appendix B).

This petition for a writ of certiorari has been timely filed within the allowable ninety days. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Section I, Fourteenth Amendment:

> Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rules Governing Section 2254 Cases in the United States District Courts, Rule 9(b):

> Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits, or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

O.C.G.A. § 16-5-40:

Kidnapping:

> (a) A person commits the offense of kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.
>
> (b) A person over the age of 17 commits the offense of kidnapping when he forcibly, maliciously, or fraudulently leads, takes, carries away, decoys, or entices away any child under the age of 16 years against the will of the child's parents or other person having lawful custody.
>
> (c) A person convicted of the offense of kidnapping shall be punished by imprisonment for not less than one nor more than twenty years, provided that a person convicted of the offense of kidnapping for ransom shall be punished by life imprisonment or by death and provided, further, that, if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death.

STATEMENT OF THE CASE

Respondent, Jack Howard Potts, was convicted following a jury trial in the Superior Court of Cobb County, Georgia of the following offenses: (1) kidnapping with bodily injury of Michael Priest; (2) armed robbery of Michael Priest; (3) armed robbery of Robert Snyder and (4) aggravated assault of Robert Snyder. Respondent received two death sentences, a life sentence and a ten year sentence, respectively. Respondent was subsequently tried in the Superior Court of Forsyth County, Georgia for the murder of Michael Priest and received the death sentence. On appeal, Respondent's convictions and sentences were affirmed by the Supreme Court of Georgia. *Potts v. State*, 241 Ga. 67, 243 S.E.2d 510 (1978). Respondent then filed for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia, but was denied state habeas corpus relief. Respondent's attorneys filed a notice of appeal, but while his appeal was pending, Respondent wrote the Supreme Court of Georgia in November of 1979, firing his attorneys and requesting that his appeal be dismissed. The Supreme Court of Georgia denied a certificate of probable cause to appeal from the denial of state habeas corpus relief, but allowed Respondent's motion to discharge his attorneys.

After the Georgia State Board of Pardons and Paroles refused to commute Respondent's death penalties to life imprisonment, Respondent's execution date was set for June 5, 1980. On June 3, 1980, Reverend Murphy Davis filed two next-friend habeas corpus petitions on Respondent's behalf. The district court found Respondent to be competent and further found that Reverend Davis did not

have standing as a next-friend. *Davis v. Austin*, Nos. C80-954A, C80-45G (N.D. Ga. June 9, 1980).

A request for a stay of execution from the United States Court of Appeals for the Fifth Circuit was denied in *Davis v. Austin*, Nos. 80-7418, 80-7419 (5th Cir. June 4, 1980). Respondent then filed two habeas corpus petitions on his own behalf. *Potts v. Austin*, Nos. C80-964A, C-80-46G (N.D. Ga. June 13, 1980). The district court stayed Respondent's execution which had been set for June 5, 1980. *Id.* However, on June 6, 1980, the district court received a letter from Respondent that he wished to withdraw his appeal and fire his attorneys so that he could be executed as soon as possible. The district court held a hearing on June 10, 1980, during which time Respondent and psychiatrist William Davis testified. The district court orally dissolved that stay, dismissed the habeas corpus petitions and entered judgment for the warden. *Potts v. Austin*, Nos. C80-964A, C80-46G (N.D. Ga. June 13, 1980).

Respondent's new execution date was set for July 1, 1980. On June 25, 1980, Reverend Davis again moved the district court for a stay of execution and the district court and the Fifth Circuit denied the motion. *Davis v. Austin*, Nos. C80-954A, C80-45G (N.D. Ga. June 25, 1980); *Davis v. Austin*, Nos. 80-7418, 80-7419 (Fifth Cir. June 26, 1980).

Immediately after the district court denied Reverend Davis' motion to stay Respondent's July 1, 1980 execution, Respondent filed two more habeas corpus petitions on his own behalf. *Potts v. Zant*, Nos. C80-1078A, C80-50G (N.D. Ga. June 26, 1980). The allegations raised in these two petitions were identical to the allegations raised by Respon-

dent in his first two applications for federal habeas corpus relief filed pursuant to 28 U.S.C. § 2254. The district court dismissed the petitions, denied the stay of execution and entered judgment for the warden. *Potts v. Zant,* Nos. C80-1078A, C80-50G (N.D. Ga. June 26, 1980). Respondent appealed to the United States Court of Appeals for the Fifth Circuit.

On appeal, the Fifth Circuit heard oral argument and determined that the district court erred in failing to hold an evidentiary hearing on the question of whether or not Respondent had abused the writ of habeas corpus and therefore, remanded the case to the district court to hold an evidentiary hearing on the issue of abuse, the sub-issue of voluntariness and if necessary, the "ends of justice" issue. *Potts v. Zant,* 638 F.2d 727, 749 (5th Cir. 1981), *cert. denied* 454 U.S. 877 (1981). The United States Court of Appeal for the Fifth Circuit also found that the district court should make findings of fact and conclusions of law with reference to these issues. *Id.* The judgment of the United States Court of Appeals for the Fifth Circuit was issued as the mandate on December 16, 1981.

On February 1, 1982, the district court concluded that in accordance with the decision of the United States Court of Appeals for the Fifth Circuit in *Potts v. Zant, supra,* it would be necessary to conduct an evidentiary hearing on the issue of abuse of the writ, the issue of voluntariness and the issue of Respondent's abandonment of his federal habeas corpus rights. A motion to disqualify District Judge William C. O'Kelley was filed on February 18, 1982. Although finding no basis for his disqualification, Judge O'Kelley recused himself and directed that the matter be reassigned to another judge.

In the meantime, Respondent filed a response in the district court following remand from the Fifth Circuit and requested that an evidentiary hearing be held as soon as possible on the issues outlined by the Fifth Circuit in *Potts v. Zant, supra.* Respondent filed a motion for partial summary judgment on the issue of whether or not Respondent was barred from proceeding on the merits of his petitions for writs of habeas corpus. Petitioner filed a response to this motion, citing the decision of the United States Court of Appeals for the Fifth Circuit directing the district court to hold an evidentiary hearing to inquire into any explanations which could be offered by Respondent to justify his actions and to inquire into any evidence in opposition which the state might offer, since the state had pled abuse of the writ. Petitioner contended that there was a genuine issue for the district court's resolution by means of the conducting of an evidentiary hearing. At this time, Respondent also filed a motion for leave to amend the petition to add a claim of ineffective assistance of trial counsel.

Although maintaining that the filing of the second set of applications for federal habeas corpus relief filed pursuant to 28 U.S.C. § 2254, constituted an abuse of the writ, Petitioner filed an answer-response and brief in support thereof as to the merits of the allegations of the petitions. The Petitioner also filed a response to Respondent's motion for leave to amend, contending that Respondent had deliberately withheld this ground from his previously filed habeas corpus petitions.

One of the orders of the district court from which Petitioner appealed to the United States Court of Appeals

for the Eleventh Circuit was entered on May 17, 1982. In this order, the district court granted Respondent's Motion for Partial Summary Judgment, i.e., refused to hold an evidentiary hearing on the question of abuse of the writ and also granted Respondent's motion to amend the petition.

Following the conducting of an evidentiary hearing on the merits of the allegations raised by Respondent in his successive applications for federal habeas corpus relief, extensive post-hearing briefs were filed on behalf of the Petitioner and Respondent and on January 7, 1983, the district court granted the writ of habeas corpus as to Respondent's Cobb County convictions and sentences, remanding the case to the Superior Court of Cobb County, Georgia for a new trial as to guilt-innocence and penalty. With reference to the Forsyth County, Georgia, conviction the district court remanded the case to the Superior Court of Forsyth County, Georgia, for resentencing. This Order was also the subject of an appeal by the Petitioner to the United States Court of Appeals for the Eleventh Circuit.

A motion to stay the judgment of the court was filed by Petitioner, as well as a timely notice of appeal. Respondent filed a cross-appeal and probable cause to appeal was certified by the district court.

Following oral argument in the United States Court of Appeals for the Eleventh Circuit, the court affirmed the finding of the district court that a new trial on the issues of both guilt-innocence and punishment should be granted with respect to the Cobb County offenses and affirming

the district court as to the Forsyth County case, with respect to the district court's findings that the prosecutor's comments during the sentencing phase required a new sentencing proceeding. The Petitioner filed a timely petition for rehearing and suggestion for rehearing *en banc* relating to all portions of the opinion finding that habeas corpus relief should be granted. Petitioner's petition for rehearing and suggestion for rehearing *en banc* was denied by the United States Court of Appeals for the Eleventh Circuit in an opinion dated June 21, 1985. (Appendix B).

Petitioner seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit in *Potts v. Zant,* 734 F.2d 526 (11th Cir. 1984) and the decision of the Eleventh Circuit denying the petition for rehearing and suggestion for rehearing *en banc,* dated June 21, 1985. (Appendix B).

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REASONS FOR GRANTING THE WRIT

I. The United States Court Of Appeals For The Eleventh Circuit Has Placed The Burden Of Pleading And Proving Abuse Of The Writ On The State, So As To Effectively Eliminate The Abuse Of The Writ Doctrine By Placing No Burden Upon A Habeas Corpus Petitioner Who Files Successive Habeas Corpus Petitions Raising Identical Claims.

The United States Court of Appeals for the Eleventh Circuit found that the district court had not erred in granting Respondent's motion for partial summary judgment

on the question of the abuse of the writ, even in light of the United States Court of Appeals for the Fifth Circuits' decision in *Potts v. Zant,* 638 F.2d 727, 747 (5th Cir. 1981), remanding the case to the district court in order for the Respondent to be afforded an opportunity to present evidence rebutting the government's pleadings. *Id.* at 747. By granting the motion for partial summary judgment, the district court ignored the instruction of the United States Court of Appeals for the Fifth Circuit in remanding the case and effectively placed no burden of proof at all on the Respondent before considering his successive applications for federal habeas corpus relief on their merits. Therefore, by sanctioning such a decision, the United States Court of Appeals for the Eleventh Circuit in *Potts v. Zant,* 734 F.2d 526 (11th Cir. 1984), rehearing denied June 21, 1985, severely undermined the efficacy of Rule 9 (b) of the Rules Governing Section 2254 Cases in the United States District Courts and ignored clear precedent of this Court as contained in such cases as *Sanders v. United States,* 373 U.S. 1 (1963) and *Price v. Johnston,* 334 U.S. 266 (1948).

In *Price v. Johnston,* 334 U.S. 266 (1948), this Court held that:

> Once the particular abuse has been alleged, the *prisoner* has the burden of answering that allegation and of proving that he has not abused the writ. If the answer is inadequate, the court may dismiss the petition without further proceedings. But if there is substantial conflict, a hearing may be necessary to determine the actual facts. Appropriate findings and conclusions of law can then be made. In this way an adequate record may be established so that appellate courts can determine the precise basis of the district court's action, which is often shrouded in ambiguity where a petition is dismissed without any expressed reasons.

Price v. Johnston, supra 292-293.

Rather than finding that the district court placed no burden upon the Respondent to excuse or justify his actions in order to avoid a finding that there was an abuse of the writ in filing two sets of duplicative applications for federal habeas corpus relief, the Eleventh Circuit found that the State had failed to carry its "heavy burden to show that Petitioner's misconduct was sufficiently grave to warrant the sanction of dismissal." *Potts v. Zant,* 734 F.2d 526, 529 (11th Cir. 1984). The State has no such burden under Rule 9(b) nor under the precedent of this Court.

The Eleventh Circuit simply concluded without the benefit of an evidentiary hearing being held in the district court, and without any reference to Respondent's ability or capability of excusing or justifying the filing of a second set of identical petitions, that the ends of justice required the district court to consider the merits of Respondent's claims.

Had the burden of proof been properly placed upon the Respondent to excuse or justify his actions in filing identical sets of applications for federal habeas corpus relief, Petitioner submits that it would be clear, as demonstrated by the extensive procedural history of the case set forth in prior portions of this brief, that Respondent abused the writ of habeas corpus and should have been precluded from having his claims determined on their merits by the district court.

By failing to hold an evidentiary hearing, the district court placed no burden on the Respondent to answer the allegations that he had abused the writ, as properly pled by the Petitioner. The district court's failure to hold an evidentiary hearing in the case resulted in there being no finding as to whether Respondent was barred from proceeding on his second set of habeas corpus petitions, because of his knowing and intelligent waiver of his right to federal habeas corpus relief by dismissing his first set of petitions. Finally, by failing to conduct an evidentiary hearing, both Petitioner and Respondent were prohibited from submitting evidence as to whether the "ends of justice" required a finding that Respondent had abused the writ.

In short, the district court's acceptance of Respondent's assertion of "good faith" with regard to all of his actions surrounding the dismissal of his first set of petitions and the filing of the second set of petitions, resulted in no burden being placed on the Respondent to excuse or justify his conduct. This conclusion was ratified by means of the decision of the Eleventh Circuit and serves to severely undermine the efficacy of the abuse of the writ doctrine and appears to lead to the conclusion that the ends of justice will always require that a person under the death sentence be given an opportunity to relitigate claims raised in a second application for federal habeas corpus relief, which claims were voluntarily dismissed by a petitioner in his first application for federal habeas corpus relief. To allow a habeas corpus petitioner to simply avoid allegations that there has been an abuse of the writ by saying that he did not intend to litigate in a piecemeal fashion or to "vex, harrass or delay" in the resolution of

the issues, would in effect be revoking the abuse of the writ doctrine.

The abuse of the writ doctrine and its application to successive petitions filed by persons under the death sentence is becoming an ever increasing subject of litigation in the federal district courts and in this Court and presents an exceptional question concerning which this Court should grant certiorari.

II. When An Indictment Clearly Charges A Defendant With Having Committed Kidnapping With Bodily Injury, A Jury's Verdict Finding The Defendant Guilty As Charged In The Indictment, Cannot Render A Verdict So "Ambiguous", As To Warrant The Finding Of A Due Process Violation, Especially Where Kidnapping With Bodily Injury Is Not A "Separate Offense", Under Georgia Law.

Respondent was tried in the Superior Court of Cobb County, Georgia, for the offense of "simple kidnapping", which was charged in count three of the indictment. The language of count three reads as follows:

COUNT THREE

A. The grand jurors aforesaid in the name and on behalf of the citizens of Georgia, further charge the accused with the offense of felony? (sic) For that said accused on the eighth day of May, 1975, in the County aforesaid with force and arms did unlawfully then and there abduct Michael D. Priest, a person, without lawful authority and held such person against his will and did kill the said Michael D. Priest by shooting him with a certain pistol; the said killing of Michael D. Priest having occurred while in the unlawful custody of the accused in Forsyth County,

> Georgia, and the said Michael D. Priest having remained in the unlawful custody of the accused from the time of his abduction in Cobb County, Georgia until the time of his homicide in Forsyth County, Georgia, contrary to the laws of this State, the good order, peace and dignity thereof.

(Record on appeal to the Supreme Court of Georgia from the Superior Court of Cobb County, Georgia, Page 5).

The trial court, during its charge in the guilt-innocence phase of Respondent's trial, read the language of this indictment to the jurors. The court defined for the jury the offenses of aggravated assault, armed robbery, robbery and kidnapping. The offense of kidnapping was previously defined in Ga. Code Ann. § 26-1311, and is now contained in O.C.G.A. § 16-5-40. It should be noted that there is no specific code section adding a definition of "bodily injury" to the charge of kidnapping. The "bodily injury" language is only set forth in that portion of the code section relating to sentencing.

Following the trial court's charge, the jury found Respondent guilty as to count three of the indictment.

During the sentencing phase of Respondent's trial, the court informed the jury that if a person was found guilty of the offense of "kidnapping", the punishment would be life in the penitentiary or death by electrocution. The trial court informed the jury with respect to the form of their verdict as to count three. (Cobb County Transcript, p. 647-648).

The verdict of the jury following the sentencing phase with respect to count three of the indictment was as follows:

> VERDICT: We, the jury, find the defendant guilty as to Count Three kidnapping, and fix the sentence as death. The offense of kidnapping of Michael Priest was committed while the offender was engaged in the commission of another capital felony, to wit: armed robbery of Michael Priest. This Eleventh day of March, 1976.

(Cobb County Transcript, Vol. III, p. 652).

In finding the Respondent guilty of count three of the indictment, regardless of whether this indictment referred to kidnapping or kidnapping with bodily injury, the jury implicity found bodily injury, because the language of the indictment included a finding that Michael Priest had been abducted against his will and was later killed by being shot with a pistol by the Respondent. Therefore, Petitioner submits that the jury did not make an "ambiguous" finding with respect to finding Respondent guilty of the offense of kidnapping with bodily injury, even though the phrase "with bodily injury" was omitted from the published verdict. Nevertheless, the United States Court of Appeals for the Eleventh Circuit found that the trial court's instructions were inadequate, thereby ignoring Georgia law, and further elevated the error which they found to an error of constitutional dimension, by concluding that these instructions deprived the Respondent of due process of law. *Potts v. Zant*, 734 F.2d 5236, 530 (11th Cir. 1984).

Respondent submits that in light of Georgia law, the language of the indictment and the language of the verdict, the Eleventh Circuit incorrectly found that the trial court's instructions were "inadequate" and further committed an error of grave significance, so as to warrant

the granting of a writ of certiorari by this Court, in finding that any alleged inadequacy deprived Respondent of due process of law. The jury's finding was clear, as simple kidnapping was never charged, except insofar as the term "kidnapping" was defined as contained in Georgia law. Even assuming for the sake of argument that the trial court's instructions were "inadequate", Respondent submits that the verdict of the jury, viewed under Georgia law, was not "ambiguous" so as to violate due process and the elevation of this alleged error to a due process violation, warrants the granting of a writ of certiorari.

III. The United States Court Of Appeals For The Eleventh Circuit Has Improperly Extended The Decision Of This Court In Donnelly v. DeChristoforo, 416 U.S. 637 (1974) And Has Improperly Relied On Its Supervisory Powers, Rather Than Its Limited Authority As A Reviewing Court In A 28 U.S.C. § 2254 Proceeding Examining State Trial Court Records For Denials Of Fundamental Fairness, By Granting Federal Habeas Corpus Relief To Respondent Based On The Prosecutor's Closing Argument.

The United States Court of Appeals for the Eleventh Circuit condemns the prosecutor's use during his closing argument at the sentencing phase of Respondent's trial of a quotation from the decision of the Georgia Supreme Court in *Eberhart v. State*, 47 Ga. 598 (1873). The Supreme Court of Georgia noted in *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977), that "it would not have been improper for the district attorney merely to have ex-

pressed to the jury the sentiments embodied in the quote from *Eberhart, supra.*" *Id.* at 336. Therefore, under state law, it was not improper for the prosecutor to argue the sentiments embodied in the cases cited by the prosecutor during his closing argument to the jury, but rather, at the time, the error under state law was to attribute the statements to a justice of the Supreme Court of Georgia.

As the sentiments expressed in the cases were properly within the scope of permissible argument under Georgia law, it is difficult to determine in what manner these statements could rise to the level of an error of constitutional dimension, merely because the cases which expressed these arguments or statements were cited to the trial court in the presence of the jury. In *Caldwell v. Mississippi*, 53 U.S. L. W. 4743, 4751 (June 11, 1985), Justice Rehnquist noted in his dissenting opinion that:

> there is nothing wrong with urging a capital sentencing jury to disregard emotion and render a decision based on the law and the facts. Despite the Court's rhetorical references to the need for 'reliable' sentencing decisions rendered by jurors that comprehend their 'awesome responsibility,' I do not understand the Court to believe that emotions in favor of mercy must play a part in the ultimate decision of a capital sentencing jury. Indeed, much of our Eighth Amendment jurisprudence has been concerned with eliminating emotion from sentencing decisions.

Id. Therefore, Petitioner submits that both under Georgia law and under federal constitutional law, as promulgated by this Court, there is nothing impermissible in arguing to the jury that their verdict at the sentencing phase of a case in which the death penalty is being sought, should not be based upon "sickly sentimentality".

As this Court noted in *Caldwell v. Mississippi*, *supra* the prior decision of the Court in *Donnelly v. DeChristoforo*, " . . . does clearly warn against holding every improper and unfair argument of a state prosecutor to be a federal due process violation. . ." *Id.* at 4748. Similarly, as Mr. Justice Rehnquist noted in his dissenting opinion in *Caldwell v. Mississippi*, "*Donnelly*, *Zant*, and *Barkley* teach that a death sentence need not be vacated in every case where the procedures by which it is imposed are in some way flawed". *Id.* at 4750.

During the state's closing argument at the sentencing phase of Respondent's trial in Forsyth County, Georgia, the prosecutor referred to facts contained in the opinion, as well as the opinion itself, of this Court in *Gregg v. Georgia*, 428 U.S. 153 (1976). The prosecutor used this reference to aid the jury in understanding the principle of law which the prosecutor was trying to illustrate. Additionally, in order to make clear the principles of law he was espousing, the prosecutor also read a passage from the decision of the Supreme Court of Georgia in *Eberhart v. State*, 47 Ga. 598 (1873). Over Respondent's attorney's objections, the trial court concluded that the prosecutor's recital from *Eberhart v. State*, *supra*, was proper. Part of the prosecutor's closing argument included a description to the jury of the four theories of punishment, i.e., retribution, deterrence, removal and rehabilitation. The district attorney argued as follows:

> I would like to call to the Court's attention what the Supreme Court has said in regard to the issue of retribution as a valid policy consideration in imposing the death penalty. This is in section 3 of the *Gregg* opinion of the Court.

(Forsyth County Transcript p. 923).

Later in the prosecutor's closing argument, the prosecutor stated:

> There is a higher duty in this case not to rehabilitate, but to insure that justice is done.
>
> Now with regard to duty. There is duty to the law, and duty to the public. I would like to call the Court's attention to what was said back in 1972 by the Supreme Court of Georgia concerning the issue of duty to the law, and duty to the public. This is in *Eberhard* (sic) *v. State*, and is found in 47 Ga., 598 610 § 9.

(Forsyth County Transcript, p. 9237).

It was at this point that Respondent's trial counsel objected to this reference to *Eberhart*. (Forsyth County Transcript, p. 927-928). The trial court found that because the prosecutor was "reading the law to the Court", that this was not improper and overruled the objection.

In *Darden v. Wainwright*, 699 F.2d 1031, 1034 (11th Cir. 1983), the Eleventh Circuit correctly cited this Court's decision in *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1973), by stating:

> On habeas corpus petition, our standard of review of the prosecutor's comments at trial is "the narrow one of due process, and not the broad exercise of supervisory power that [federal appellate courts] possess in regard to [their] own trial court[s]." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 1871, 40 L.Ed 2d, 431 (1973).

In reviewing this issue, the Supreme Court of Georgia found as follows:

> We find that the passage read from *Gregg* was not inflammatory nor did it lead the jury to believe that

> they were not to consider mitigating circumstances. The excerpt from *Gregg* was merely a concise statement concerning the validity of retribution as a policy consideration in imposing the death penalty.

Id. at p. 85.

Petitioner respectfully submits that the reasoning of the Supreme Court of Georgia was proper and that viewed in context, there was no denial of fundamental fairness to the Respondent. Concerning the reference to *Eberhart,* the Supreme Court of Georgia found that this action did not unduly influence the jury to impose the death penalty, *Id.* at 86. The Supreme Court of Georgia referred to one of its prior decisions in *Presnell v. State,* 241 Ga. 49, 62 (1978), in which the Supreme Court of Georgia had stated that "written words of a since deceased jurist could not have inflamed the jury more than the facts of the case themselves." *Potts v. State, supra,* at 85.

Petitioner submits that as the principles of *Donnelly v. DeChristoforo,* were improperly followed by the Eleventh Circuit and that had the Eleventh Circuit exercised its authority, not as a superivsory court, but rather as a reviewing court in a habeas corpus proceeding examining the record for due process violations, no federal habeas corpus relief would have been granted to the Respondent. The manner in which circuit courts review the arguments of state prosecutors and utilize their power under the Federal Habeas Corpus Act presents an exceptional question as to which this Court should grant a writ of certiorari.

———o———

CONCLUSION

For all of the above and foregoing reasons, Petitioner prays that this Court grant a writ of certiorari in order to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit in *Potts v. Zant, supra,* and *Potts v. Kemp, Supra.*

Respectfully submitted,

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APPENDIX A

Jack Howard POTTS, Petitioner-Appellee,
Cross-Appellant,

v.

Walter D. ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent-Appellant,
Cross-Appellee.

No. 83-8087.

United States Court of Appeals,
Eleventh Circuit.

May 29, 1984.

Petitioner appealed from an order of the United States District Court for the Northern District of Georgia, 492 F.Supp. 326, dismissing his federal habeas petitions. The Court of Appeals, 638 F.2d 727, affirmed in part, and vacated and remanded in part, and denied rehearing, 642 F.2d 1210. The District Court, Charles A. Moye, Jr., Chief Judge, 575 F.Supp. 374, granted relief. On appeal, the Court of Appeals, Vance, Circuit Judge, held that: (1) failure of trial judge to offer jury any specific instruction on importance of finding of bodily injury with respect to kidnapping charge denied petitioner due process of law; (2) double jeopardy did not prohibit murder conviction following conviction of kidnapping with bodily injury arising out of same incident; (3) instructions on intent did not impermissibly shift burden of proof from state to petitioner; but (4) prosecutor's closing argument at sentencing trial in which he read excerpt from prior state Supreme Court's decision was improper as an at-

tempt to suggest to jury that prior decisions of that court mandated imposition of death penalty in instant case.

Affirmed.

James C. Hill, Circuit Judge, filed specially concurring opinion.

* * *

Before HILL and VANCE, Circuit Judges, and TUTTLE, Senior Circuit Judge.

VANCE, Circuit Judge:

The state of Georgia appeals, and the petitioner cross-appeals, the decision of the district court granting habeas corpus relief in both of the cases involved in this consolidated proceeding. *Potts v. Zant,* 575 F.Supp. 374 (N.D.Ga.1983). We reach the same result as the district court, requiring a new guilt/innocence trial in No. C80-1078A and a new sentencing trial in No. C80-50G.

The petitioner in these proceedings, Jackie Potts, was charged with armed robbery, aggravated assault, and kidnapping with bodily injury in Cobb County and with murder in Forsyth County as a result of a violent spree on May 8, 1975. Specifically, Potts was accused of shooting and robbing Eugene Snyder and abducting and robbing Michael Priest in Cobb County before murdering Priest in Forsyth County. Potts was convicted of kidnapping, aggravated assault, and two counts of armed robbery in Cobb County, and of murder in Forsyth County. He received three death sentences: one on the kidnapping charge in Cobb County, a second on one of the armed robbery counts in Cobb County, and a third on the murder charge in Forsyth County. The Georgia Supreme Court subsequently vacated the death sentence on the Cobb County

armed robbery charge on direct appeal. *Potts v. State,* 2341 Ga. 67, 243 S.E.2d 510 (1978).

After unsuccessfully seeking state habeas corpus relief, Potts authorized the filing of an initial set of petitions under 28 U.S.C. § 2254 attacking his convictions and two remaining death sentences within hours of his scheduled execution on June 5, 1980. Less than two days later, Potts sought to withdraw this authorization so that he might die while in a "state of grace" with God. Following a hearing on June 10, the district court granted Potts' request on June 13, and a new execution date was set for July 1, 1980. On June 25, however, Potts authorized the filing of a second set of federal habeas corpus petitions. The district court held a hearing on the legal issues involved on June 26, but refused an offer by Potts' attorneys to present evidence demonstrating the involuntariness of his decision to withdraw the first set of petitions. The district court found an abuse of the writ with regard to Potts' filing of the second set of petitions on the grounds that he had voluntarily relinquished his rights by withdrawing the first set of petitions, and again refused a request by Potts' attorneys for an evidentiary hearing on the issue of abuse. On appeal, this court ruled that the district court had erred in denying the petitioner an evidentiary hearing after the filing of the second set of idential petitions and remanded the case with instructions to afford Potts an opportunity to rebut the state's allegations of abuse and to demonstrate why his initial withdrawal of the first set of petitions had not been knowing and voluntary. *Potts v. Zant,* 638 F.2d 727 (5th Cir. Unit B) [*Potts I*], *cert. denied,* 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981). The panel further noted that

even if the district court should find that it was possible to dismiss such a successive petition without consideration of the merits, the ends of justice might require that it reach the merits of the petition. *Id.* at 751-52.

Potts' attorneys subsequently filed in the district court a motion for partial summary judgment on the issue of abuse. Applying the test of *Sanders v. United States,* 373 U.S. 1, 18, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963), the district court concluded that there was no evidence to support the state's claim that Potts' actions had been taken in bad faith or in order to "vex, harass, or delay" the court. The district court therefore granted the motion for partial summary judgment. *Potts v. Zant,* Nos. C80-1078A & C80-50G (N.D.Ga., May 17, 1982). An evidentiary hearing on the substantive issues in the case was held on June 4, 1982, and the district court entered its order granting the writ on January 6, 1983. The district court vacated Potts' conviction on the kidnapping charge in Cobb County, since it found that the trial court had failed to instruct the jury on the law of kidnapping with bodily injury and the jury had returned a verdict which did not clearly find Potts guilty of anything more than "simple" kidnapping, which is not a capital offense. With regard to the Forsyth County proceedings, the district court found that the inflammatory and improper arguments used by the prosecutor required a new sentencing trial, but it rejected the petitioner's contentions that his Forsyth County murder conviction constituted a violation of the fifth amendment prohibition against double jeopardy and that the jury instructions of the trial judge improperly shifted the burden of proof on the element of intent. The state appealed, and the petitioner cross-

appealed the adverse judgment of the district court on the Forsyth County issues.

[1, 2] Before we address the substantive contentions raised by the state and the petitioner on appeal, it is first necessary for us to consider whether the district court acted properly in granting Potts' motion for partial summary judgment on the question of abuse of the writ. The state contends that this court's decision in *Potts I* mandated the holding of an evidentiary hearing and that it was error for the district court to refuse to do so. It is clear from this court's decision in *Potts I* and leading precedents such as *Price v. Johnston,* 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948), however, that a hearing on the issue of abuse of the writ is necessary only when there is "a substantial conflict" as to the actual facts involved. *Price v. Johnston,* 334 U.S. at 292, 68 S.Ct. at 1063. The district court in this case found that there were no disputed issues of material fact with regard to Potts' reasons for authorizing and subsequently withdrawing his first set of petitions, and held as a matter of law that the facts established in Potts' affidavit and the record of the two previous hearings failed to support the state's claim of bad faith. We see no reason to disturb this holding on appeal, particularly since this court emphasized in *Potts I* that the ends of justice might require the district court to consider the merits of petitioner's complaint even if there did appear to be a colorable basis for the state's claim of abuse. In cases in which a man's life is at stake and he has not had an opportunity to secure federal review of the alleged constitutional defects in his conviction and sentence, the state must meet a heavy burden when it

argues that the petitioner's misconduct is sufficiently grave to warrant the sanction of dismissal. We have no hesitation in concluding that the state has failed to carry that burden in the present instance, and we therefore proceed to a consideration of the merits of this appeal.

I. THE KIDNAPPING VERDICT

The petitioner challenges his conviction and death sentence on Count III of the Cobb County indictment on the grounds that the jury's verdict found him guilty only of "simple" kidnapping, which is not a capital offense, rather than kidnapping with bodily injury, which is a capital offense under Georgia law. Off.Code Ga. Ann. § 16-5-40 (1982). The state contends that since the jury's verdict at the guilt/innocence trial clearly found Potts guilty on Count III, which charged that Potts abducted Michael Priest and then killed him, we can infer that the jury intended to find the petitioner guilty of kidnapping with bodily injury, rather than the lesser included offense of "simple" kidnapping. This confusion arises from the form of the jury's verdict, which stated simply that "We, the jury, find the defendant guilty as to Count Three, kidnapping." The jury's verdict at the sentencing trial heightened rather than lessened this ambiguity. The jury was instructed on several possible aggravating circumstances, including that "[t]he offense of kidnapping of Michael Priest was committed while the offender was engaged in the commission of another capital felony, to-wit: murder of Michael Priest." The jury, however, declined to list this as an aggravating circumstance supporting its decision to impose the death penalty on Count III and instead based its death sentence on the aggravating circumstance that the kidnapping was committed during the course of an armed robbery.

[3] While there is thus some degree of uncertainty as to what the Cobb County jury intended to find with regard to the kidnapping charge, the central problem here is the fact that the Cobb County trial judge never offered the jury any specific instructions on the importance of a finding of bodily injury, omitting any reference to this element of the offense in the instructions he utilized at both the guilt/innocence trial and the sentencing trial.[1] Because a finding of bodily injury to the victim is essential to support the imposition of the death penalty for the crime of kidnapping under Georgia law, we cannot treat this flaw in the jury instructions lightly. The Supreme Court has stressed that "[w]hen a defendant's life is at stake, [courts must be] particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia,* 428 U.S. 153, 187, 96 S.Ct. 2909, 2931, 49 L.Ed.2d 859 (1976) (plurality opinion). This standard obviously has not been met when a trial judge fails to instruct the jury on an element of a crime that is essential to support a death sentence for that offense. *Cf.* 2 C. Wright, Federal Practice & Procedure: Criminal 2d § 487 ("It is a grave error to

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1. The respondent argues that the trial judge was not required to instruct the jury on the law of kidnapping with bodily injury, pointing out that the state supreme court has held that "bodily injury is a term of common usage requiring no legal definition." *Smith v. State,* 236 Ga. 5, 222 S.E.2d 357, 361 (1976). This contention misses the point. The trial judge here never even used the phrase "with bodily injury" in his instructions, and completely failed to explain to the jury that it was critically important for them to distinguish between a finding of "simple" kidnapping and kidnapping with bodily injury.

submit a case to a jury without accurately defining the offense charged and its elements. Such an error is not excused or waived by failure to request a proper instruction."); *see also United States v. Herzog,* 632 F.2d 469, 472 (5th Cir.1980) ("A trial court has the obligation to instruct the jury on *all* the essential elements of the crime charged, even though the defendant fails to request such an instruction.") (emphasis in the original).[2] We therefore conclude that the inadequacy of the trial judge's instructions at both the guilt/innocence and sentencing trials in Cobb County deprived the petitioner of due process of law. The writ must issue unless a new trial is held on both guilt/innocence and sentencing. Because we conclude that retrial is required on this ground, we do not reach the other challenges raised by the petitioner to the validity of his Cobb County conviction.

II. THE DOUBLE JEOPARDY ISSUE

The petitioner also challenges his conviction on the Forsyth County murder charge, asserting that it constitutes a violation of the constitutional prohibition against

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2. We find additional support for this conclusion in the Georgia Supreme Court's decision in *Patrick v. State,* 247 Ga. 168, 274 S.E.2d 570 (1981), *cert. denied,* 459 U.S. 1089, 103 S.Ct. 575, 74 L.Ed.2d 936 (1982). In that case, the trial judge charged the jury that the fact that a murder was committed during the course of "another capital felony, to-wit: a Kidnapping," could constitute an aggravating circumstance that would warrant imposition of the death penalty. The jury's verdict stated simply that an aggravating circumstance existed because the murder was committed during the course of a "kidnapping." Emphasizing that "[s]imple kidnapping is not a capital felony," the Georgia Supreme Court ruled that "the jury's finding of 'kidnapping' in this case cannot support the death penalty." *Id.* 274 S.E.2d at 572.

double jeopardy. Potts argues that it is improper for the state to seek two capital convictions—for kidnapping with bodily injury in Cobb County and for murder in Forsyth County—as a result of his participation in a single incident: the kidnapping and subsequent murder of Michael Priest. The petitioner further contends that the action of the Cobb County jury in returning a verdict that stated simply that the defendant was guilty of "kidnapping" constitutes an acquittal on the charge of kidnapping with bodily injury and a finding of guilt on the lesser included offense of "simple" kidnapping, and therefore bars a second capital prosecution, for murder, on the same set of facts.

[4] The Supreme Court has recognized that the double jeopardy clause consists of three separate constitutional protections. It protects against a second prosecution for the same offense after conviction; it bars a second prosecution for the same offense after acquittal; and it prohibits multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). The petitioner asserts that his murder conviction in Forsyth County constitutes a violation of the second and third of these guarantees. We conclude that his arguments are without merit.

[5] The critical question under either of the theories advanced by the petitioner is whether kidnapping with bodily injury and malice murder can be considered the same offense. The established test for determining whether two offenses are sufficiently distinguishable to avoid the prohibition against double jeopardy was set forth by the Supreme Court in *Blockburger v. United States,* 284

U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), in which it was held that the determinig factor is whether "each provision requires proof of a fact which the other does not." *Id.* at 304, 52 S.Ct. at 182. Thus, as long as each offense, "requires proof of a different element," *id.*, and the facts necessary to prove each offense are not sufficient to prove the other offense, *Brown v. Ohio,* 432 U.S. 161, 166-68, 97 S.Ct. 2221, 2225-26, 53, L.Ed.2d 187 (1977), there is no violation of the double jeopardy clause. Applying this analysis to the issue raised by the petitioner, both this court and the Georgia Supreme Court have concluded that kidnapping with bodily injury and malice murder are not the same offense. The state supreme court first considered this issue in *Pryor v. State,* 238 Ga. 698, 234 S.E.2d 918, *cert. denied,* 434 U.S. 935, 98 S.Ct. 422, 54 L.Ed.2d 294 (1977), in which it held that the two crimes are not the same as a matter of law because

> [k]idnapping with bodily injury requires an unlawful abduction or stealing away and the holding of a person, plus the infliction of some bodily injury upon that person. The crime of murder is committed when one man causes the *death* of another with the peculiar mental state of express or implied malice. As a matter of *law,* because of the different elements of the crime, murder is not included within kidnapping with bodily injury.

Id. 234 S.E.2d at 923 (emphasis in the original). This conclusion was subsequently reaffirmed on the direct appeal of this case, *Potts v. State,* 241 Ga. 67, 243 S.E.2d 510, 519-20 (1978), and in *Stephens v. Hopper,* 241 Ga. 596, 247 S.E.2d 92, 95, *cert. denied,* 439 U.S. 991, 99 S.Ct. 593, 58 L.Ed.2d 667 (1978). In these decisions the state supreme court made it clear that the two crimes are also distinct

as a matter of fact, since proof of different facts is required by the elements of each offense. Similarly, this court concluded in *Stephens v. Zant* that "[m]alice murder and kidnaping with bodily injury have separate and distinct elements and require proof of different facts. . . . Thus, even if they involve the same transaction and considerably overlap each other factually, they are not the 'same offense' under *Blockburger,* 631 F.2d 397, 401 (5th Cir.1980), *modified,* 648 F.2d 446 5th Cir.1981), *rev'd on other grounds,* — U.S. —, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

[6, 7] The petitioner argues strenuously that *Pryor* is factually distinguishable because the victim in that case suffered other, non-fatal physical injuries that were independently sufficient to support the kidnapping with bodily injury charge, whereas in this case there was only one injury to the victim—the gunshot wound which killed him. Potts contends that the state supreme court's decision in this case was an incorrect application of Georgia law and that the correct state law principle is that evidence of a single act may not be used to sustain multiple felony convictions. On collateral review, however, this court can concern itself only with alleged violations of federal constitutional rights, and it is clear that federal jurisprudence accords significantly less protection to the accused under the double jeopardy clause than Georgia has elected to provide under Off. Code Ga.Ann. §§ 16-1-6, -7, and -8. Thus, while the Georgia courts have held that "a crime is an included crime and multiple punishment therefor is barred if it is the same as a matter of fact *or* as a matter of law," *State v. Estevez,* 232 Ga. 316, 206 S.E.2d 475, 478 (1974) (emphasis in the original), the federal courts have used a

narrower test, phrasing it in the conjunctive rather than the alternative. *See, e.g., United States v. Henry,* 661 F.2d 894, 896 (5th Cir. Unit B 1981), *cert. denied,* 455 U.S. 992, 102 S.Ct. 1619, 71 L.Ed.2d 853 (1982) ("To succeed on a claim of double jeopardy, a defendant must show that in law *and* fact the two offenses charged are in reality the same.") (emphasis added); *United States v. Cala,* 521 F.2d 605, 607 (2d Cir.1975). Thus, regardless of whether the state supreme court correctly interpreted Georgia's double jeopardy statute on the direct appeal in this case, it is clear under *Blockburger* as a matter of federal constitutional law that a single act may form the basis for prosecutions under two separate statutes if different elements of proof are required. In *Blockburger* itself, the Court held that a single sale of narcotics could subject the defendant to liability for the separate offenses of selling morphine from a package without the required customs stamps and selling drugs without a written order from the purchaser. The *Blockburger* Court supported its conclusion by quoting *Morey v. Commonwealth,* 108 Mass. 433, 434 (1871), which held that "'[a] single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.'" 284 U.S. at 304, 52 S.Ct. at 182; *see also Gavieres v. United States,* 220 U.S. 338, 342-43, 31 S.Ct. 421, 422-23, 55 L.Ed. 489 (1911).

Federal law therefore clearly permits a defendant to be prosecuted on two separate offenses arising out of the same set of facts as long as each offense requires the proof

of an additional fact or element which the other does not. Because malice murder and kidnapping with bodily injury are not the "same offense" under the *Blockburger* test, *Stephens v. Zant, supra,* we conclude that the petitioner's murder conviction in Forsyth County did not violate the constitutional prohibition against double jeopardy.

III. THE FORSYTH COUNTY JURY INSTRUCTIONS

The petitioner also argues that the jury instructions utilized at his Forsyth County murder trial impermissibly shifted the burden of proof from the state to the defendant on the key issue of intent. Specifically, the petitioner points to these statements by the trial court judge as being impermissible under *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and *Mason v. Balkcom,* 669 F.2d 222 (5th Cir. Unit B 1982), *cert. denied,* 460 U.S. 1016, 103 S.Ct. 1260, 75 L.Ed.2d 487 (1983):

> A specific intent to commit the crime of murder charged in this Indictment is an essential element that the State of Georgia must prove beyond a reasonable doubt. Intent is always a question for the jury, and as I have said, it is ordinarily ascertained by acts and conduct. But intent may be shown in many ways, provided that you jurors find that intent existed from the evidence produced before you.
>
> Intent may be inferred from the proven circumstances, *or it may be presumed, when it is the natural and the probable consequences of the act for which the defendant is being prosecuted.*
>
> I also want to give you certain presumptions of law that are applicable to this case. Now a presumption of law is a conclusion which the law draws from

given facts. Each one of these presumptions of law that I am going to give you are rebuttable. That is, they are subject to being overcome by evidence to the contrary.

There are three of them.

1. *Every person is presumed to be of sound mind and discretion.*

As I have said that presumption is subject to being overcome by evidence to the contrary.

2. *The acts of a person of sound mind and discretion are presumed to be the product of that person's will.*

3. *A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts.*

As I have said, these presumptions of law are rebuttable. That is they are subject to being overcome by evidence to the contrary.

The petitioner contends that the italicized passages are constitutionally invalid under *Sandstrom* and *Mason*. In *Sandstrom,* the Supreme Court ruled that the charge, "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," without more, might well have misled a reasonable juror into believing that the presumption was either irrebuttable or subject to disproof only if the defendant could demonstrate the contrary "by some quantum of proof which may well have been considerably greater than 'some' evidence—thus effectively shifting the burden of persuasion on the element of intent." 442 U.S. at 517, 99 S.Ct. at 2455. Similarly, this court held in *Mason* that a charge stating that "the law presumes that a person intends to accomplish the natural and probable consequences of his conduct" was impermissible under the *Sandstrom* rule. 669 F.2d at 225.

Despite some apparent similarities, however, we conclude that the disputed passages of the charge in this case are distinguishable from those condemned in *Sandstrom* and *Mason* and did not relieve the state of its burden of proving all essential elements of the crime beyond a reasonable doubt.

[8-10] In analyzing challenges to criminal convictions based on allegedly improper jury instructions, we must begin with the well-established proposition that

> a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. . . .
>
> . . . [T]he question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.

Cupp v. Naughten, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). In this case, the petitioner challenges two passages in the trial court's jury instructions. The first of these—which stated that "[i]ntent may be inferred from the proven circumstances, or it may be presumed, when it is the natural and probable consequences of the act for which the defendant is being prosecuted"—is virtually identical to that approved by this court in *Hance v. Zant,* 696 F.2d 940, 953 (11th Cir.), *cert. denied,* — U.S. —, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983).[3] The

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3. The trial court in *Hance* instructed the jurry that intent "may be inferred from the proven circumstances or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act." 696 F.2d at 953.

Hance court stressed that the use of permissive language such as "may be presumed" substantially reduced the likelihood that a reasonable juror would conclude that the instruction required an inference of intent. *See also Lamb v. Jernigan,* 683 F.2d 1332, 1339 (11th Cir.1982), *cert. denied,* 460 U.S. 1024, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983) (approving an instruction stating that intent "may be inferred . . . from proven circumstances or by the acts and conduct of the defendant or [] may be presumed when it would be the natural and necessary consequence of the particular acts"). We therefore find no error with regard to this passage in the instructions.

[11] The second passage challenged by the petitioner consists of a set of three presumptions, each of which uses the mandatory phrasing "is presumed." As we have seen, however, we must consider the charge as a whole in order to determine whether this language may have misled the jury into believing that these presumptions were mandatory rather than permissive in character. We conclude that, for a variety of reasons, the overall effect of the charge delivered here was such that it is unlikely that a reasonable juror would have given these presumptions conclusive or persuasion-shifting effect. First, with regard to the last of the three presumptions, the trial judge was simply restating what he had said a moment earlier while using the permissive language "may be inferred" and "may be presumed." Second, the trial judge repeatedly stated that these presumptions were "rebuttable" and "subject to being overcome by evidence to the contrary," a fact which clearly serves to distinguish this case from *Sandstrom,* in which the Supreme Court specifically noted that the jurors "were not told that the presumption could

be rebutted . . . by the defendant's simple presentation of 'some' evidence; nor even that it could be rebutted at all." 442 U.S. at 517, 99 S.Ct. at 2455; *see also Corn v. Zant,* 708 F.2d 549, 559 (11th Cir.1983).

Finally, unlike the instructions disapproved in *Sandstrom* and *Mason,* the charge in this case contained other language similar to that endorsed by this court in *Lamb v. Jernigan* as reducing the likelihood that the jury might misunderstand the permissive character of these presumptions. In *Lamb,* the court noted that the instructions "informed the jury of the presumption of innocence, and the state's burden of proof beyond a reasonable doubt. Moreover the jury was specifically instructed that intent is an essential element to be determined by it *from the evidence* produced at trial." 683 F.2d at 1339 (emphasis in the original) (footnote omitted). The instructions at issue here contain similar language on all of these points. For example, the trial court stated that "a person will not be presumed to act with criminal intention, but you jurors, who are the triers of the facts of the case may find criminal intention, upon consideration of the words, the conduct, the demeanor, the motive, and all the other circumstances connected with the act for which this defendant Potts is being prosecuted." Elsewhere in the instructions the trial court emphasized that "a crime is a union or a joint operation of act and intention. An intention is an essential element of any crime, and that burden is on the State to prove such intention beyond a reasonable doubt." With regard to the insanity defense that Potts raised in the Forsyth County proceedings, the trial court stressed that

> the burden is not on this defendant to disprove intention. When the defendant introduces some competent evidence of insanity, which might tend to negate evil intention in the defendant at the time of the commission of the alleged crime, then the burden falls upon the State to prove beyond a reasonable doubt that the defendant was sane at the time of the alleged crime, and therefore he had the requisite criminal intent.

Toward the end of the instructions, the trial judge reiterated that "a person will not be presumed to act with criminal intention" and carefully set forth the burdens of proof with regard to the insanity defense raised by Potts, emphasizing that "[i]t is not necessary that this defendant produce evidence of his insanity sufficient to convince you beyond all reasonable doubt, but rather it is only necessary for him to introduce some competent evidence of his insanity."

In short, the instructions viewed as a whole clearly do not shift the burden of proof on the issue of intent. The trial judge stated no less than three times that criminal intent would not be presumed and must be proved by the state beyond a reasonable doubt, and his instructions adequately set forth the evidentiary burdens with regard to the insanity defense. We therefore conclude that the instructions utilized in the Forsyth County proceedings were constitutionally acceptable under *Sandstrom* and the jurisprudence of this circuit.

IV. PROSECUTORIAL MISCONDUCT

The petitioner also contends that his death sentence on the murder charge in Forsyth County should be invalidated because the prosecutor made improper remarks dur-

ing his closing argument at the sentencing trial. In his summation, the district attorney over objection read excerpts from the Supreme Court's decision in *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976),[4] and the Georgia Supreme Court's decision in *Eberhart v. State,* 47 Ga. 598 (1873).[5] The petitioner argues that the reading of these passages was an improper attempt to suggest to the jurors that it was their legal duty to impose the death penalty. We agree that the reading from *Eberhart* was improper and therefore remand this case for a new sentencing trial in Forsyth County.

[12, 13] Initially, we note that in reviewing a habeas corpus petitioner's claim of prosecutorial misconduct in

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4. The prosecutor quoted a passage from Justice Stewart's plurality opinion in *Gregg,* see 428 U.S. at 183-84, 96 S.Ct. at 2929-30, dealing with the retributive function of capital punishment.

5. The prosecutor quoted the following passage from *Eberhart,* 47 Ga. at 510:

> We have no sympathy with that sickly sentimentality that springs into action whenever a criminal at length is about to suffer for a crime. This may be the sign of a tender heart, but it is also a sight of one not under proper regulation. Society demands that crime be punished, and that criminals be warned, and the false humanity that shudders when justice is about to strike is a dangerous element for society. We have too much of this mercy. It is not true mercy. It only looks to the criminal. We must insist upon the mercy to society and upon justice for the poor woman whose blood crys (sic) out against her murderers. That criminals go unpunished is a disgrace to our civilization. We have reaped the fruits of it in the frequency with which bloody deeds occur. A stern, unbending, unflinching administration of penal laws without regard to position, or sex, as it is the highest mark of civilization, also is the surest mode to prevent the commission of offense.

the context of a jury argument, our standard of review is the narrow one of due process, rather than the broad exercise of supervisory power that federal appellate tribunals possess with regard to their own trial courts. *Donnelly v. DeChristoforo,* 416 U.S. 637, 642, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974). Thus, the petitioner must establish that the prosecutor's allegedly improper remarks were sufficiently prejudicial to render his trial fundamentally unfair. *Darden v. Wainwright,* 699 F.2d 1031, 1034 (11th Cir.), *vacated,* 715 F.2d 502 (11th Cir.1983), *reinstated in pertinent part,* 725 F.2d 1526, 1532 (11th Cir.1984). The same standard of fundamental fairness governs our examination of allegations of prosecutorial misconduct at both the guilt/innocence trial and the sentencing trial in a capital case. *Id.*; *Hance v. Zant,* 696 F.2d 940, 953 (11th Cir.1983). Nevertheless, because "it is most important that the sentencing phase of the trial not be influenced by passion, prejudice, or any other arbitrary factor," *id.* at 951, this circuit has recognized that the threshold of fundamental unfairness may be crossed more easily in the latter context.

The *Eberhart* court's florid denunciation of "that sickly sentimentality" that prompts some citizens to oppose the death penalty appears to have made it a particular favorite of Georgia prosecutors, and the propriety of quoting *Eberhart* in the presence of the jury has been considered by the state supreme court on at least four occasions, *see Drake v. State,* 241 Ga. 583, 247 S.E.2d 57 (1978), *cert. denied,* 440 U.S. 928, 99 S.Ct. 1265, 59 L.Ed.2d 485 (1979); *Potts v. State,* 241 Ga. 67, 243 S.E.2d 510 (1978); *Presnell v. State,* 241 Ga. 49, 243 S.E.2d 496 (1978), *rev'd in part on other grounds,* 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.

2d 207 (1979); and *Hawes v. State,* 240 Ga. 327, 240 S.E.2d 833 (1977), and recently by this circuit as well. *Drake v. Francis,* 727 F.2d 990 (11th Cir.1984), *vacated,* 727 F.2d at 1003. The Georgia Supreme Court initially condemned the practice of quoting from *Eberhart* in *Hawes,* stating:

> We do believe, however, that the remarks by the district attorney were improper. It would not have been improper for the district attorney merely to have expressed to the jury the sentiments embodied in the quote from *Eberhart, supra.* [cite omitted] However, the district attorney's attribution of those sentiments to a justice of this court with the object of influencing the jury to impose the death penalty was improper and is disapproved.

240 S.E.2d at 840 (dictum). While *Hawes* did not address the issue of whether the use of *Eberhart* at the sentencing phase would merit a new trial on the question of punishment, the court subsequently declined to apply its criticism retroactively in *Presnell* and *Potts* and held that the use of an *Eberhart* argument did not require new trials in those cases, reasoning that "the written words of a since deceased jurist could not have inflamed the jury more than the facts of the case themselves." *Presnell,* 243 S.E.2d at 507; *see also Potts,* 243 S.E.2d at 523. The court displayed a similar degree of tolerance when the issue was next presented in *Drake,* ruling that it was permissible for the prosecutor to utilize *Eberhart* as long as his remarks were addressed to the court, rather than the jury. The *Drake* court did admonish prosecutors that "it would be preferable if such arguments were conducted outside of the jury's presence." 247 S.E.2d at 60.

The distinction recognized by the state supreme court in *Drake* on the direct appeal of that case was recently re-

jected by this court in its collateral review of the same proceedings. In *Drake v. Francis,* this court faced a situation virtually identical to the present one. The Georgia prosecutor read the same *Eberhart* excerpt quoted by the district attorney here and also read a passage from *Hawkins v. State,* 25 Ga. 207 (1857). The *Drake* court held that these remarks "so inflamed the passions and prejudices of the jury" as to require that the sentence be vacated and the case remanded for resentencing. 727 F.2d at 996. The court rejected the state's argument that the prosecutor's remarks were acceptable because technically directed to the judge, even though the jury was present and was obviously the intended audience. *Id.*

[14] Although *Drake* has been vacated pending rehearing by the *en banc* court, we find its reasoning on this issue persuasive. The district attorney here also prefaced his remarks by stating that they were addressed to the court, but this was an obvious subterfuge; the trial judge had indicated that he was familiar with *Eberhart* before the prosecutor read the quotation in question, and the district attorney turned to the jurors and commenced his formal jury argument as soon as he finished reading the disputed passage. The prosecutor was plainly attempting to suggest to the jury that prior decisions of the state supreme court mandated the imposition of the death penalty in this case, and this conduct was clearly improper. The jury may have been misled into believing that it had a legal duty to return a death sentence and consequently failed to give its decision the independent and unprejudiced consideration the law requires. The writ therefore must be issued with respect to the Forsyth County murder charge unless a resentencing proceeding is held. Because we find that the prosecutor's use of the *Eberhart* argument mandates a retrial on the issue of punishment, we need not address the propriety of the district attorney's practice of quoting from *Gregg v. Georgia,* and we do not reach the other issues raised below that are applicable to the sentencing trial in the Forsyth County proceedings.

V. CONCLUSION

Because of the inadequacy of the jury instructions utilized by the Cobb County trial judge with respect to the charge of kidnapping with bodily injury, we affirm the finding of the district court that the writ must issue unless a new trial is granted in Cobb County on the issues of both guilt/innocence and punishment. With regard to the Forsyth County proceedings, we find that the prosecutor's improper comments during the sentencing phase require that the writ issue unless a new sentencing proceeding is ordered and affirm the district court on this issue as well. We conclude that the other issues raised by the petitioner on his cross-appeal are without merit and therefore affirm the judgment of the district court.

AFFIRMED.

JAMES C. HILL, Circuit Judge, concurring specially:

I concur. However, lest my concurrence in Part IV be misconstrued as extending to inferences one might draw from what is there said, I write, briefly, separately.

I find no constitutional fault in a trial advocate's calling to the court's attention principles of law touching upon issues in a case, even though counsel interrupts his own summation to do so. Thus, if counsel is urging the jury to find that reasonable doubt exists as to his client's guilt,

I apprehend that he may, then and there, urge the judge to instruct the jury that, if it entertains reasonable doubt, it must acquit, citing precedent requiring such an instruction.

Here, however, the prosecutor did not undertake to call to the judge's attention any authority for any proposition of law. The judgments of the Supreme Court of Georgia were, of course, binding on the Superior Court trying Mr. Potts, but it cannot be said that the quoted remarks of the justice who wrote the opinion for that court in *Eberhart v. State,* 47 Ga. 598 (1873), bound the trial court judge or juror. As presented by the prosecutor, it appeared that the Supreme Court of the state had ruled that "sickly sentimentality," a "tender heart," "false humanity," "mercy," and consideration of the criminal defendant had been declared unlawful in Georgia and that a juror who entertained such feelings would be a lawbreaker.

Yet we are taught by *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1967), that jurors with such feelings and inclinations are qualified to serve if they are willing to abide the law and find the facts without bias. Here, the trial court permitted it to be represented to the contrary and the representation was not corrected.

I apprehend, but do not decide, that I would agree with the Supreme Court of Georgia that "the written words of a since deceased jurist" (*Presnell v. State,* 241 Ga. 49, 243 S.E.2d 496, 507 (1978)) could not have unconstitutionally affected the sentencing procedure. However, the quotation was not of an individual; it was of the Supreme Court of the state. It was not put forth as a person's view;

it was proffered as the law. I believe it not to have been the law when written in 1873. At all events, it was not the law at the time of this trial. *Witherspoon* was announced in 1967.

For these reasons, I concur in Part IV; I also concur in all else stated in the opinion.

APPENDIX B

Jack Howard POTTS,
Petitioner-Appellee, Cross-Appellant,

v.

Ralph KEMP, Warden, Georgia Diagnostic
and Classification Center,
Respondent-Appellant, Cross-Appellee.

No. 83-8087.

United States Court of Appeals,
Eleventh Circuit.

June 21, 1985.

Petitioner whose conviction of aggravated assault, kidnapping with bodily injury, and armed robbery had been affirmed, 241 Ga. 67, 243 S.E.2d 510, appealed from an order the United States District Court for the Northern District of Georgia, 492 F.Supp. 326, dismissing his federal habeas petitions. The Court of Appeals, 638 F.2d 727, affirmed in part, and vacated and remanded in part, and denied rehearing, 642 F.2d 1210. The District Court, Charles A. Moye, Jr., Chief Judge, 575 F.Supp. 374, granted relief. On appeal, the Court of Appeals, 734 F.2d 526, affirmed. On State's petition for rehearing, the Court of Appeals held that: (1) where uncontroverted evidence presented to District Court judge did not establish that habeas petitioner had acted with intent to vex, harass, or delay in withdrawing first set of petitions, evidentiary hearing was unnecessary with respect to issue of abuse of writ raised by state, and (2) prosecutor's use of an inflammatory passage from a prior state Supreme Court decision was so misleading, legally incorrect and prejudicial as to warrant resentencing.

Petition denied.

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

(Opinion May 29, 1984, 11th Cir.,
1984, 734 F.2d 526).

Before HILL and VANCE, Circuit Judges, and TUTTLE, Senior Circuit Judge.

BY THE COURT:

The petition for rehearing filed by appellant in this case asserts several points of error in our earlier decision. Appellant raises two contradictory objections to our holding on abuse of the writ. First, appellant suggests that our decision improperly held that the state had to meet a "heavy burden" to establish abuse of the writ. *Potts v. Zant* (*Potts II*), 734 F.2d 526, 529 (11th Cir.1984). Second, appellant suggests our decision erred because it "simply concluded without the benefit of an evidentiary hearing being held in district court, that the ends of justice required the district court to consider the merits of Petitioner's claims." It therefore appears that some clarification may be in order.

[1, 2] Our earlier decision did not hold that the state must meet a particularly stringent burden in *pleading* abuse of the writ. Under *Price v. Johnston,* 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948) and Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts (28 U.S.C. foll. § 2254), it is clear that the government's only burden in pleading abuse of the writ is "to make that claim with clarity and particularly in its return to the order to show cause." *Price,* 334 U.S. at 292, 68 S.Ct. at 1063. Once the state has properly raised the

issue, the petitioner then has the burden of answering the allegation and proving that he has not abused the writ. *Id.* The state could meet the initial burden of sufficient pleading here. It faced a considerably more difficult task, however, once the petitioner responded: to convince the court that the abuse was sufficiently grave that nothing, not even the "ends of justice," would warrant consideration of the merits of the petitioner's claims. The state's position would be particularly difficult where—as in the present case—the petitioner has not yet secured a determination on the merits of his claims. *Potts v. Zant* (*Potts I*), 638 F.2d 727, 741-42, 751-52 (5th Cir. Unit B), *cert. denied,* 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981). Thus, "[i]f a petitioner is able to present some 'justifiable reason' explaining his actions, reasons which 'make it fair and just for the trial court to overlook' the allegedly abusive conduct, the trial court should address the successive petition." *Potts I,* 638 F.2d at 741 (quoting *Price,* 334 U.S. at 291, 68 S.Ct. at 1063).

[3] That is precisely what occurred in the present case. Although the state carried its burden of pleading abuse of the writ, the district judge concluded that the uncontroverted evidence presented to him did not establish that the petitioner had acted with the intent to "vex, harass, or delay." *Sanders v. United States,* 373 U.S. 1, 18, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963). Our opinion simply noted that even if the district court had concluded that Potts acted in bad faith in withdrawing his first set of petitions, it would still be within the trial court's discretion to review the second set of petitions under the "ends of justice" rationale set forth by the Supreme Court in *Sanders.* In any event, we believe that the trial court

correctly concluded that there was no genuine dispute as to Potts' motives for withdrawing his initial set of petitions. The Supreme Court's decision in *Price* suggests merely that a hearing "may be necessary" where there is a "substantial conflict" as to the actual facts. *Price,* 334 U.S. at 292, 68 S.Ct. at 1063. Since no such conflict was present here, the district court properly concluded that an evidentiary hearing was unnecessary.

[4] Appellant also claims that this court erred in condemning the prosecutor's use of a quotation from *Eberhart v. State,* 47 Ga. 598 (1873), in closing argument. It argues that although the use of the statement is not favored, it does not rise to the level of constitutional error. We note that the en banc court has subsequently supported our reasoning in *Drake v. Kemp,* 762 F.2d 1449, — (1985) (en banc). The *Drake* court found that the inflammatory passage was "misleading, legally incorrect and prejudicial," at — and that the prejudice was serious enough to warrant resentencing.

The petition for rehearing is DENIED. No member of this panel nor Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the petition for rehearing en banc is also DENIED.

APPENDIX C

Jack Howard POTTS, Petitioner,

v.

Walter D. ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent.

Civ. A. No. C80-1078A.

United States District Court,
N.D. Georgia,
Atlanta Division.

Jan. 6, 1983.

Petitioner appealed from an order of the United States District Court for the Northern District of Georgia, William C. O'Kelley, J., 492 F.Supp. 326, as well as another order by that same court which dismissed his first and second sets of federal habeas petitions respectively. The Court of Appeals, R. Lanier Anderson, III, Circuit Judge, 638 F.2d 727, affirmed in part and vacated and remanded in part. The District Court, Moye, Chief Judge, held that: (1) failure of trial court to instruct jury at guilt/innocence phase that it was considering charge for a crime involving bodily injury which could result in death penalty necessitated reversal of kidnapping conviction; (2) petitioner was not placed twice in jeopardy for the same offense; (3) since one of three aggravating circumstances used to support death sentence in state murder prosecution was invalidated by the Georgia Supreme Court, failure to reverse death sentence based on invalid aggravating circumstance deprived the petitioner of his rights under Eighth and Fourteenth Amendments; (4) jury in one of the state trials was improperly selected; (5) charge during guilt/innocence phase of one

of the state trials did not violate petitioner's right to due process of law; (6) petitioner did not have effective assistance of counsel at one state trial but did at the other; and (7) prosecutor's recital to jury from Georgia Supreme Court cases during penalty phase of murder case violated right to rational sentencing hearing and right to due process.

Ordered accordingly.

* * *

ORDER

MOYE, Chief Judge.

This consolidated action includes two habeas corpus petitions. The first, Civil Action No. C80-1078A, pending in the Atlanta Division of this Court, involves constitutional challenges to petitioner's conviction of kidnapping and resulting sentence of death, following a multi-county crime spree, in Cobb County, Georgia, Superior Court. The second petition, Civil Action No. C80-50G, pending in the Gainesville Division of this Court, involves constitutional challenges to petitioner's conviction of murder, and subsequent sentence of death, in the Superior Court of Forsyth County, Georgia. The Court now has before it the substantive issues raised by the two petitions following an evidentiary hearing held on June 4, 1982, at which petitioner was physically present.

Petitioner's attorneys, including one attorney appointed and to be compensated by the Court, have filed pursuant to the Court's request and directions a 104-page document setting forth the issues of law and fact raised by petitioner, his proposed findings of fact and statements of law in support thereof. The state has filed a brief in

response thereto paralleling the form of petitioner's document. This order likewise will conform subject-wise and in sequence to petitioner's document in an effort to make a direct ruling on each issue.

Issue One (Cobb County)

Petitioner contends that at his capital trial, in Cobb County, he was indicted on charges of kidnapping with bodily injury,—but that the jury failed to find bodily injury and thus, in fact, he was convicted only of simple kidnapping—a conviction which would not authorize a death sentence.

The indictment upon which petitioner was convicted in Cobb County charged (Respondent's Exhibit No. 1, pp. 614-615):

> Count Three. And the Grand Jurors aforesaid in the name and behalf of the citizens of Georgia, further charge the accused with the offense of Felony for that the said accused on the 8th day of May, 1975, in the county aforesaid with force and arms did unlawfully then and there abduct Michael D. Priest, a person, without lawful authority and held such person against his will and did kill the said Michael D. Priest by shooting him with a certain pistol; the said killing of Michael D. Priest having occurred while in the unlawful custody of the accused in Forsyth County, Georgia, and the said Michael D. Priest having remained in the unlawful custody of the accused from the time of his abduction in Cobb County, Georgia, until the time of his homicide in Forsyth County, Georgia; contrary to the laws of this State, the good order, peace, and dignity thereof.

Georgia Code 26-1311 (now 16-5-40) upon which Count III of the Cobb County indictment was predicated, provides:

> 26-1311 Kidnapping
>
> (a) A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.
>
> * * *
>
> A person convicted of kidnapping shall be punished by imprisonment for not less than one nor more than 20 years: Provided that a person convicted of kidnapping for ransom shall be punished by life imprisonment or by death; and Provided, further, that if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or death.

The trial was bifurcated into an innocence/guilt phase and a sentencing phase upon an initial finding of guilt. In his charge to the jury at the innocence/guilt phase, the trial court stated (Respondent's Exhibit 1, p. 624):

> Members of the jury, Count Three of this indictment charges kidnapping and at this time I instruct you a person commits kidnapping when he abducts or steals away any person without legal authority or warrant and holds such person against his or her will.

The court informed the jury that its verdict at this phase of the trial must be only as to guilt or innocence "without any consideration of punishment." (Respondent's Exhibit 1, p. 628). The jury's verdict was "We, the jury, find the defendant guilty as to Count Three, kidnapping." (Respondent's Exhibit 1, p. 637).

At the sentencing phase of the case, the court charged the jury as follows (Respondent's Exhibit 1, pp. 644-649).

THE COURT: Ms. Smith and gentlemen of the jury, you have found the defendant guilty of the offense of kidnapping, Count Three, and guilty of the offense of armed robbery, Count Four. It is now your duty to determine

the penalty that shall be imposed as punishment for those offenses.

Under the law of this state every person guilty of the offense of kidnapping and armed robbery shall be punished by life in the penitentiary or death by electrocution.

You are to apply the remaining instructions which will be given to you by me and determine whether the defendant should be punished by death or life imprisonment. In reaching this determination you are authorized to consider all the evidence received by you in open court in both phases of the trial. You are authorized to consider all the facts and circumstances of the case.

In the event that your verdict is life imprisonment the punishment that the defendant would receive would be imprisonment in the penitentiary for and during the remainder of his natural life. If that be your verdict, you would add to the verdict already found by you, an additional verdict as follows: "And we fix his punishment as life imprisonment."

You may, however, if you see fit and if that be your verdict, fix his punishment as death, which would require a sentence by the court of death by electrocution. If that be your verdict, you would add to the verdict already found by you, an additional verdict as follows: "And we fix his punishment as death."

I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution, you must find evidence of statutory aggravating circumstances, as I will define to you later in the charge, sufficient to authorize the supreme penalty of the law.

I charge you that a finding of statutory aggravating circumstances shall only be based upon evidence convincing your mind beyond a reasonable doubt as to the existence of one or more of the following factual conditions in connection with the defendant's perpetration of the acts for which you have found him guilty. They are:

(1) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(2) The offense of kidnapping of Michael Priest was committed while the offender was engaged in the commission of another capital felony, to-wit: armed robbery of Michael Priest.

(3) The offense of armed robbery of Michael Priest was committed while the offender was engaged in the commission of another capital felony, to-wit: kidnapping of Michael Priest.

(4) The offense of kidnapping of Michael Priest was committed while the offender was engaged in the commission of another capital felony, to-wit: murder of Michael Priest.

Further, members of this jury, I give you these instructions:

(1) Aggravated circumstances are those which increase the guilt or enormity of the offense or add to its injurious consequences.

(2) Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered

as extenuating or reducing the degree of moral culpability or blame.

Members of the jury, if you find that either or more than one aggravating circumstance existed beyond a reasonable doubt, and you recommend the death penalty, then the court is required by law to sentence the defendant to death.

On the other hand you may, if you see fit, whether aggravating circumstances existed or not, recommend mercy for the defendant. This recommendation is solely in your discretion and not controlled by any rule of law. You may make such recommendations with or without a reason. If this should be your finding, then the court is required by law to sentence the defendant to life imprisonment.

The statutory instructions that you are authorized to consider will be submitted in writing to you for your deliberation. If you fix his punishment as death, you must also designate in writing, as a part of your written verdict, the aggravating circumstance or circumstances which you find to be true beyond a reasonable doubt.

Members of the jury, should your verdict be death as to Count Number Three, kidnapping, the verdict as completed, including the portion of the verdict you have already published, would be: "We, the jury, find the defendant, Jack Howard Potts, guilty of kidnapping, and we find aggravating circumstances as follows," inserting there the aggravating circumstance or circumstances in the language set forth that I will send out to you, "and we fix his punishment as death by eletrocution."

Should your verdict as to punishment, Count Number Three, kidnapping, be life imprisonment, to complete it include the portion, of the verdict you have already published as follows: "We, the jury, find the defendant, Jack Howard Potts, guilty of kidnapping and we fix his punishment as life imprisonment."

* * * * * *

Members of the jury, the verdict should be agreed to by all twelve of you members; it must be in writing and entered upon the indictment, dated, and signed by your foreman, and returned into court for publication.

At this time you may retire and begin your deliberation. After you have received the indictment, you will also have the evidence with you that was introduced here during the trial of the case, including documentary evidence presented on the pretrial—or, presentence hearing—excuse me—the presentence hearing, and then determine the penalty or punishment that should be imposed in this case.

At this time you may retire to complete your verdict by fixing the defendant's punishment for the offenses of kidnapping and armed robbery; that is, Count Three and Four. Thank you very much.

The verdict was: "We the jury, find the defendant guilty as to Count Three, kidnapping, and fix the sentence as death. The offense of kidnapping of Michael Priest was committed while the offender was engaged in the commission of another capital felony, to-wit: armed robbery of Michael Priest." (Respondent's Exhibit 1, p. 652).

[1] A lawful death sentence under Georgia Code Section 26-1311, as related to the situation here presented.

has three required elements: (1) conviction of kidnapping pursuant to Code Section 26-1311(a), plus (2) the receipt of bodily harm by the person kidnapped, and (3) a finding of evidence of a statutory aggravating circumstance. (Respondent's Exhibit 1, p. 645).

There is no issue before the Court as to the existence or adequacy of the record as to elements 1 and 3. The issue is as to whether the jury found, or was required to make a specific finding or verdict, as to the second element.

Petitioner asserts that "simple" kidnapping and "kidnapping with bodily harm" are two *separate* offenses, and therefore the verdict is insufficient in form to support the death sentence. Under this view of the nature of the offense defined in Code Section 26-1311, the element of bodily harm to the kidnapped person would be an essential element of the crime to be proved at the guilt/innocence trial, with instructions, presumably on a lesser included offense of "simple" kidnapping. See *Smith v. State,* 236 Ga. 5, 10, 222 S.E.2d 357 (1976). That was not done here despite the holding of the Supreme Court of Georgia following its mandatory sentencing hearing: "In Case No. 32857 the appellant received sentence[s] of death for the crime[s] of kidnapping with bodily injury . . . The jury found the offense of kidnapping with bodily injury (the bodily injury being the death of Michael Priest) to have been committed while the offender was engaged in the commission of another capital felony, armed robbery of Michael Priest, . . . The death penalty for kidnapping with bodily injury is not unconstitutional where the victim is killed."

Other cases by the Supreme Court of Georgia persuade this Court that the question of whether the kidnapping is punishable as a capital offense is a question of the grade of crime charged in the indictment and proved at the innocence/guilt phase of the trial. *Allen v. State,* 233 Ga. 200, 203, 210 S.E.2d 680 (1974); *Smith v. State,* 236 Ga. 5, 10, 222 S.E.2d 357 (1976).

Here the indictment was sufficient to charge the capital crime. There is no contention otherwise.

Here the evidence shows clearly that the kidnapped person suffered extreme bodily injury—death. There is contention otherwise.

[2] However, the court never instructed the jury at the guilt/innocence phase that it was considering the charge of a crime involving bodily injury.

The jury, however, returned a verdict of guilty as to Count III—which charged the kidnapping and killing of Michael Priest.

[3] We believe, however, that where the life or death of a human being depends upon the jury's determination of certain required categories of conditions, or happenings, as here, such determination cannot be left to inference alone. This position is reinforced by *Patrick v. State,* 247 Ga. 168, 170, 274 S.E.2d 570 (1981), although we recognize the factual difference between the two situations. In that case the court held that a finding of "kidnapping" only would not serve as an aggravating circumstance in a murder case under Ga. Code 27-2534.1, allowing the death penalty to be imposed if "The offense of murder 'was committed while the offender was engaged in the commission of another capital felony'" because, as the Court said "Simple kidnapping is not a capital felony . . . kidnap-

ping with bodily injury is. The court here charged only 'kidnapping' and the jury found only 'kidnapping.'" That is all the trial court and jury did here. We believe specific charges by the Court and specific findings by the jury (by verdicts) as to all the required enhancing or aggravating factors were required, and, in their absence, petitioner's conviction must be and hereby is vacated and the petitioner remanded for retrial.

Issue Two (Cobb County)

[4] Petitioner contends that his Cobb County sentence of death does not pass muster under the Eighth and Fourteenth Amendments because of a lack of finding by the jury, not only of kidnapping with bodily injury, but in addition, of a murder in connection with this capital offense.

To the extent that this argument involves failure to make findings necessary to enhance the kidnapping offense from simple kidnapping to kidnapping with bodily injury, the Court agrees with petitioner, as set forth with respect to issue one; to the extent petitioner seems to argue that the bodily injury to the kidnapped person required to make kidnapping with bodily injury punishable by death without any extrinsic aggravating factor is the capital offense of murder, the Court might also agree, if that were the case, but the jury in Cobb County did not predicate its death verdict upon the kidnapped person's murder as the aggravating capital felony, but rather found armed robbery as the aggravating capital felony. Thus we reject petitioner's claims under issue two.

Issue Three (Forsyth County)

Petitioner contends that his trial for murder in Forsyth County, subsequent to his kidnapping conviction in

Cobb County discussed hereinabove, placed him twice in jeopardy for the same offense in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

This issue was discussed at length, in relation both to the federal Constitution and state constitution and statutes in *Potts v. State,* 241 Ga. 67, 77-80, 243 S.E.2d 519, 519-520:

> 11. Appellant's first enumeration of error in case No. 33259 alleges that the trial court erred in denying his plea of former jeopardy. The appellant contends that, having been convicted of kidnapping with bodily injury of Michael Priest in Cobb County, jeopardy attached to the homicide of Michael Priest, and therefore, appellant's subsequent conviction in Forsyth County for the murder of Michael Priest constitutes double jeopardy.
>
> The Georgia Code distinguishes between two aspects of double jeopardy. "First, there are limitations upon multiple prosecutions arising from the same criminal conduct. Code Ann. § 26-506 entitled, 'Multiple prosecutions for same conduct' requires all crimes arising from the same conduct to be prosecuted in a 'single prosecution' *provided they are in the same jurisdiction* and are known to the prosecutor unless the court in the interest of justice orders separate trials. Code Ann. § 26-507 sets out in detail when a second prosecution is barred." (Emphasis supplied.) *State v. Estevez,* 232 Ga. 316, 318 (206 SE2d 475) (1974). A prosecution is not barred within the meaning of Code Ann. § 26-507, "if the former prosecution was before a court which lacked jurisdiction over the accused or the crime." This is the procedural aspect or the bar to multiple prosecutions, intended to prevent an accused from being unduly harassed by or threatened by successive criminal prosecutions.

In Georgia "[A]ll criminal cases shall be tried in the county where the crime was committed . . ." Code Ann. § 27-1101. In the instant case, it is undisputed that the murder of Michael Priest took place in Forsyth County and that the kidnapping with bodily injury took place in Cobb County. As a matter of law, the two offenses were not within a single court's jurisdiction, and could not have been tried together. Therefore, we find no procedural bar to the appellant's subsequent prosecution for the murder of Michael Priest in Forsyth County.

"The second policy expressed in the 1968 Georgia Criminal Code limits the convictions or punishments that may be imposed for crimes arising from the same criminal conduct. This is generally referred to as the *substantive* aspect of the double jeopardy principle in that it relates to the penalty for criminal conduct as distinguished from the procedural aspects of successive prosecutions discussed above." (Emphasis supplied.) *Estevez, supra*, p. 319 [206 S.E.2d 475].

When the same conduct of an accused establishes the commission of more than one crime, the accused may be prosecuted for but may not be convicted of more than one crime if, "[O]ne crime is included in the other." Code Ann. § 26-506(a) (1). Code Ann. § 26-505(a) and (b) establish *alternative* rules for determining when one crime is included in another as a matter of fact (Code Ann. § 26-505(a)) *or* as a matter of law (Code Ann. § 26-505(b)) so as to bar conviction and punishment for more than one crime.

Recently, in *Pryor v. State,* 238 Ga. 698, 701 (234 SE2d 918) (1977), we held that murder and kidnapping with bodily injury are not included crimes as a matter of law. However, some confusion surrounds the issue of whether these two offenses are included as a matter of fact as a result of the discussion in *Pryor* of a hypothetical fact situation not then before the court.

As a matter of fact a crime is included when, "[I]t is established by *proof of the same or less than all the facts* of a less culpable mental state than is required to establish the commission of the crime charged." (Emphasis supplied.) Code Ann. § 26-505(a). For proof of kidnapping with bodily injury it is necessary that the evidence show an unlawful abduction or stealing away and the holding of a person, plus the infliction of some bodily injury upon that person. Code Ann. § 26-1311. There is no requirement to prove death of the person kidnapped even if the injuries do result in death.

The indictment in Case No. 32857 alleged as the bodily injury the *killing* of Michael Priest. Under such an indictment, it was necessary for the state to prove *death.* However, the state had to prove the additional element of an unlawful abduction against the will of Michael Priest to accompany his killing in order to establish kidnapping with bodily injury. There was no requirement in the Cobb County case that the state prove the existence of malice aforethought, which was a necessary element of the murder conviction in Case No. 33259.

No matter what may have been put into evidence, the key consideration is whether one of the crimes was established by proof of the same or less than all the facts required to establish the commission of the crime charged.

We hold that as a matter of fact, as well as a matter of law, the murder of Michael Priest and the kidnapping of Michael Priest with bodily injury were not included offenses so as to bar his being prosecuted and subsequently convicted of both crimes.

We do not treat here the issue of whether an allegation of proof which merely elevates the seriousness of the offense and the severity of punishment can constitute former jeopardy or whether a "twice use" for the crime and the punishment is permissible, since

these issues have previously been discussed in the *Pryor* decision.

There being no procedural bar to appellant's prosecution for the murder of Michael Priest nor any substantive bar to his being convicted and punished for that crime, the trial court did not err in denying appellant's plea of former jeopardy.

The almost identical argument involving the same constitutions and laws was made in *Stephens v. Zant,* 631 F.2d 397, 400-402 (5th Cir. 1980), and denied by the court of appeals:

I. DOUBLE JEOPARDY

The Twiggs County indictment for kidnapping recited that he killed the kidnap victim. The third count reads as follows:

COUNT III

And the aforesaid Grand Jurors . . . charge and accuse Alpha Otis O'McDaniel Stephens . . . with the offense of KIDNAPPING for that the said Alpha Otis O'Daniel Stephens . . . in the county aforesaid . . . did unlawfully and with force and arms abduct and steal away Roy Ashell, a person, without lawful authority, and held Ray Asbell against his will and did physically abuse and did inflict and cause bodily injury to the body of Roy Asbell by beating, hitting and kicking Ray Asbell and did threaten to kill Roy Asbell and then did kill Roy Asbell by shooting Roy Asbell, contrary to the laws of said State . . . .

Petitioner argues that by stating that in the course of the kidnaping he killed Asbell, the State unwittingly accused him of the crime of murder because the indictment alleged all the elements of murder. When he pled guilty under Count III of the Twiggs indictment, he admitted

every fact averred in the indictment. At that point, his argument continues, he ran the risk—i.e., was placed in jeopardy—of a conviction of murder under a felony-murder theory. Since under Georgia law felony murder and malice murder are different ways in which one offense may be committed, *Leutner v. State,* 235 Ga. 77, 218 S.E. 2d 820 (1975), he argues the State was barred by the Double Jeopardy Clause from prosecuting him for malice murder in Bleckley County.

The Supreme Court of Georgia responded to petitioner's argument by holding that malice murder and kidnapping are not the same in law or in fact and thus are not the same offense under state law. It also determined that the state legislature intended, under the test in Ga. Code Ann. §§ 26-505 to 507, to permit multiple prosecutions and punishments in a case such as this. *Stephens v. Hopper,* 241 Ga. [596] at 598-600, 247 S.E.2d [92] at 94-95. *Cf. Whalen v. United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) (holding that the Double Jeopardy Clause prohibits courts from imposing greater penalties than the legislature intended).

While this is the definitive interpretation of Georgia law and binding upon this Court, *Mullaney v. Wilbur,* 421 U.S. 684, 691, 95 S.Ct. 1881, 1885, 44 L.Ed.2d 508 (1975), the holding does not adequately respond to petitioner's argument. Petitioner's contention is not that kidnapping and malice murder are the "same offense." Rather, he asserts that felony murder was charged in the indictment, that by pleading guilty he was placed in jeopardy of conviction for that crime and therefore the state is barred from any further attempt to prosecute him for murder.

[1, 2] Petitioner's contention that he was placed in jeopardy of a conviction for murder in Twiggs County is erroneous, because there was no jurisdiction in that county to try him for the homicide. The rule is absolute that a person is not put in jeopardy unless the court in which he was tried the first time had jurisdiction to try him for the charge the person now seeks to avoid. The Supreme Court has twice spoken to the point.

> We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged.

Graftin v. United States, 206 U.S. 333, 345, 27 S.Ct. 749, 751, 51 L.Ed. 1084 (1907).

> An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense.

United States v. Ball, 163 U.S. 662, 669, 16 S.Ct. 1192, 1194, 41 L.Ed. 300 (1896).

The Georgia Constitution requires that, unless an impartial jury cannot be obtained, "all criminal cases shall be tried in the county where the crime was committed." Ga. Const. Art. VI, § XIV, ¶ VI (Ga.Code Ann. § 2-4306). The Supreme Court of Georgia specifically held in this case that the Twiggs County court did not have jurisdiction to try the murder offense. *Stephens v. Hopper,* 241 Ga. at 599, 247 S.E.2d at 95. The Fifth Circuit held in *Tennon v. Ricketts,* 574 F.2d 1243, 1245 (1978), *cert. denied,* 439 U.S. 1091, 99 S.Ct. 874, 59 L.Ed.2d 57 (1979), that "it is for the Georgia Supreme Court, not this Court,

to expound the decisional rules of that, jurisdiction." *Accord, Hortonville Education Assn.,* 426 U.S. 482, 488, 96 S.Ct. 2308, 2312, 49 LEd.2d 1 (1976); *Mullaney v. Wilbur,* 421 U.S. 684, 691, 95 S.Ct. 1881, 1885, 44 L.Ed.2d 508 (1975); *Eisenstadt v. Baird,* 405 U.S. 438, 441-42, 92 S.Ct. 1029, 1032, 31 L.Ed.2d 349 (1972) (all holding that the highest state court is the final authority on questions of state law and federal courts are bound to accept its interpretation of state law.)

[3] The question of the jurisdiction of a state trial court in a state criminal prosecution is clearly a question of state law, which binds this Court. Since the Twiggs Superior Court had no jurisdiction to hear the murder offense, petitioner was not placed in jeopardy of a murder conviction, under either a malice murder or felony murder theory in the Twiggs County proceedings.

[4] Petitioner was, however, placed in jeopardy for the offense of kidnapping with bodily injury. The Double Jeopardy Clause bars a subsequent prosecution for any offense deemed the "same offense" under the test in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932).

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

The Supreme Court held in *Brown v. Ohio,* 432 U.S. 161, 97 S.Ct. 2221, 58 L.Ed.2d 187 (1977), that a lesser or greater included offense is the "same offense" for double jeopardy purposes. It thus becomes necessary to deter-

mine whether petitioner's murder conviction was for the "same offense" as his kidnapping charge.

[5] Malice murder and kidnapping with bodily injury have separate and distinct elements and require proof of different facts. Kidnapping consists of abducting another unlawfully and against his will, plus inflicting some bodily injury. Malice murder consists of killing another with malice aforethought. Thus, even if they involve the same transaction and considerably overlap each other factually, they are not the "same offense" under *Blockburger*. In addition, as found by the Georgia Supreme Court, the Georgia legislature intended multiple punishment for kidnapping and malice murder in a case such as this. *Stephens v. Hopper*, 241 Ga. at 599-600, 247 S.E.2d at 95-96.

[6, 7] As felony murder is defined under Georgia law, the underlying felony is a lesser included offense of felony murder and thus the same offense under *Blockburger*. *See Young v. State*, 238 Ga. 548, 233 S.E.2d 750 (1977); *Reed v. State*, 238 Ga. 457, 233 S.E.2d 369 (1977). Once the State tried and convicted petitioner for kidnapping, it would be barred from prosecuting him for felony murder only if the underlying felony upon which that prosecution was based were that same kidnapping. *Illinois v. Vitale*, [447] U.S. [410], 100 S.Ct. 2260, 65 L.Ed.2d 228. *See Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715; *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977).

[8] We have examined the record closely to see whether the Bleckley County murder prosecution was based in any part on a theory of a felony murder with the underlying felony being the kidnapping of Roy Asbell. The record clearly shows that petitioner was indicted, tried and

convicted solely on the grounds that he committed murder with malice aforethought. The trial judge specifically instructed the jury on the requirements of malice.

> I further charge you that on the trial of a defendant for the offense of Murder the burden is on the State to prove malice, either expressed or implied, and unless the State proves malice beyond a reasonable doubt there can be no verdict of guilty of Murder, and you should acquit of that charge. For as I said, there can be no Murder without malice.

Where, as here, it is clear petitioner was tried and convicted for malice murder and that crime was not the "same offense" as the kidnapping with bodily injury for which he was convicted in the first proceeding, the Double Jeopardy Clause does not bar the malice murder conviction regardless of whether malice murder and felony murder are the "same offense" under the *Blockburger* test. Petitioner's double jeopardy argument is accordingly rejected.

[5] To the extent that this case possibly is not absolutely on all fours with *Stephens, supra*, the Court now holds, based on the reasoning in *Stephens*, that the action of the Cobb Superior Court in charging the jury that it could consider the victim's "murder" as an aggravating factor upon which it could predicate a death penalty in the Cobb County kidnapping case did not constitute former jeopardy with respect to the Forsyth County malice murder indictment (Respondent's Exhibit 2, p. 7) and conviction.

[6] The only additional argument which petitioner seems here to be making is that the failure of the Cobb County jury to find the death of Michael Priest as an aggravating circumstance collaterally estops a factual find-

ing by the Forsyth County jury of an essential element of the murder charge there, the death of Michael Priest. But a failure to make a finding is not the equivalent of a negative finding, at least where a finding on that particular issue one way or the other is not legally required. Here one aggravating circumstance was all the Cobb County jury was required to make to invoke the death penalty although the Court gave it the choice of making several such findings. Its mere failure to find the "murder" of Michael Priest as an aggravating circumstance does not estop the State from proving Priest's death in the Forsyth County murder trial.

Therefore petitioner's argument as to double jeopardy with respect to the Forsyth County conviction is rejected.

Issue Four (Forsyth County)

[7] Petitioner contends that since one of the three aggravating circumstances used to support his death sentence in Forsyth County was invalidated by the Georgia Supreme Court, its failure to reverse the death sentence based on that invalid aggravating circumstance deprived petitioner of his rights under the Eighth and Fourteenth Amendments to the Constitution.

The Georgia Supreme Court held *Potts v. State, supra,* 241 Ga. 87, 243 S.E.2d 510:

> In Case No. 33259, the jury found as statutory aggravating circumstances to the murder of Michael D. Priest, "(1) armed robbery of Eugene Robert Snyder; (2) the kidnapping of the person of Michael D. Priest resulting in bodily injury to said persons; (3) the armed robbery of Michael D. Priest." Code Ann. § 27-2534.1(b) (2). The evidence in Case No. 33259 supports each of the statutory aggravating circumstances found by the jury.

> The imposition of two death sentences on the basis of mutally aggravating circumstances cannot be upheld. *Gregg,* supra. However, where the death sentences are legally and factually supported by additional aggravating circumstances, no violation of *Gregg,* supra, is present. *Jarrell v. State,* 234 Ga. 410 (216 S.E.2d 258) (1975).
>
> In Case No. 33259, without the armed robbery of Michael Priest, which was used to support the death sentence for kidnapping in Case No. 32857, the death sentence for murder is adequately supported by either of the two remaining statutory aggravating circumstances.

Although we note in this case that the infirmity in the aggravating circumstance struck by the Georgia Supreme Court was not constitutional, and the rationale of that holding possibly eliminated by this Court's action is vacating the Cobb County conviction (Issue One), nevertheless we are squarely bound by the holding of the Court of Appeals for the Fifth Circuit in the opinion of *Stephens v. Zant, supra,* 631 F.2d 405-406 (1980), which has become a part of the Eleventh Circuit law (*Bonner v. Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc)), and must grant the writ of habeas corpus, and remand the case to the Superior Court of Forsyth County, Georgia for further proceedings.

Issue Five (Cobb County)

[8] Petitioner contends that the Cobb County jury was improperly selected in that persons who did not make it unmistakably clear that they would automatically vote against capital punishment were systematically excluded from the jury in violation of petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

We agree, *Witherspoon v. Illinois,* 391 U.S. 510, 521, 88 S.Ct. 1770, 1776, 20 L.Ed.2d 776 (1968). See discussion of Issue Six.

Issue Six (Forsyth County)

[9] Petitioner contends that the Forsyth County jury which tried him was improperly selected in that persons who did not make it unmistakably clear that they would automatically vote against capital punishment were systematically excluded from the jury in violation of petitioner's rights under the Sixth, Eighth and Fourteenth amendments to the Constitution of the United States.

During the Forsyth County voir dire, eight jurors were struck for cause on the basis of their conscientious scruples against the death penalty. As to the two jurors involved in this habeas corpus, the following occurred at voir dire. (Tr. Forsyth Co. 94-103)

> MR. MILLS [prosecutor]: Ms. Free, would it be your opinion that you would vote against the death penalty, regardless of what transpired at the trial:
>
> JUROR FREE: Yes.
>
> MR. MILLS: I am going to ask you another question, just to make sure that you are absolutely certain of that position. Are you certain that that is the way you feel?
>
> JUROR FREE: Yes.
>
> MR. MILLS: Would it be your attitude and your opposition to the death penalty that in your opinion it would effect [sic] your verdict with regard to guilt?
>
> JUROR FREE: Yes.
>
> MR. MILLS: The State challenges this juror for cause, Your Honor.

> THE COURT: Do you have any questions of this juror, Mr. Watson?
>
> MR. WATSON: Yes. How long have you entertained this feeling that you have about capital punishment?
>
> JUROR FREE: Since they re-instated it.
>
> MR. WATSON: Did you understand the question that the Assistant District Attorney asked you, that regardless of the evidence in this case, would you be opposed—not withstanding how gruesome the evidence might be, or how certain the evidence might be—to capital punishment?
>
> JUROR FREE: I don't believe in killing anybody.
>
> THE COURT: Now the next one that I have is Mr. Hugh Henderson.
>
> MR. MILLS: Mr. Henderson, I will ask you if it would be your opinion that you would have to vote against the death penalty regardless of what happened, or what transpired during the trial in this case?
>
> JUROR HENDERSON: Yes sir.
>
> MR. MILLS: Would the fact that you are so opposed to capital punishment effect [sic] your verdict with regard to the issue of guilt? Do you understand what I mean?
>
> JUROR HENDERSON: Yes sir, and it would.
>
> MR. MILLS: You think that it would effect [sic] your verdict with regard to the issue of guilt?
>
> JUROR HENDERSON: Yes sir.

The fundamental criteria upon which this challenge must be resolved are set forth in *Witherspoon v. Illinois,* 391 U.S. 510, 522-523, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776 (1968), where the Court held that the state retains the right to exclude only those veniremen who

> make unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

(Emphasis in original). *See Adams v. Texas,* 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1979); *Battie v. Estelle,* 655 F.2d 692, 693 (5th Cir.1981).

The two prongs of *Witherspoon* are disjunctively and not conjunctively joined by an "or."

Petitioner's argument here is directed solely against the first prong. The two jurors' affirmative responses that their attitude toward the death penalty would affect their verdicts on the issue of guilt seem to the Court squarely responsive to the second prong of the *Witherspoon* formula, and petitioner's challenge here is rejected.

Issue Seven (Cobb County)

[10] Petitioner contends that his Cobb County conviction is invalid because of the prosecution's knowing refusal to reveal a plea offer of ten years, which would not increase even if rejected, to the chief witness against petitioner.

The Court rejects this claim. The evidence does not support the existence of "any understanding or agreement" as would be required to be disclosed under *Giglio v. U.S.*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), but rather merely the communication to the witness's attorney, now representing petitioner, of the prosecutor's personal

evaluation of the case against the witness in terms of time to be served.

Issue Eight (Forsyth County)

[11] Petitioner contends that the charge of the Forsyth County trial court to the jury during the guilt/innocence phase of the trial violated the petitioner's right to due process of law under the Fourteenth Amendment to the United States Constitution by shifting the burden of proof of the essential elements of the offense of murder away from the state and forcing petitioner to disprove these elements.

Petitioner points to pages 841-842 of the transcript of the Forsyth County trial to support his contention, and those portions do seem to contain an element of burden shifting by reference to presumptions. However, the charge as a whole clearly places upon the prosecution the burden of proving intent (the element as to which petitioner contends the charge was faulty) beyond a reasonable doubt as the issue was specifically raised in the defense of insanity. See Transcript pp. 855-859, particularly pages 857-859.

Petitioner's contention under this issue is rejected.

Issue Nine (Cobb County)

[12] Petitioner contends that at his Cobb County trial he did not have the effective assistance of counsel required by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The thrust of petitioner's claim is that his appointed counsel failed sufficiently to investigate his troubled back-

ground to be able to make an adequate presentation at the bifurcated sentencing hearing following his adjudication of guilt, and instead did not do so, despite an amplitude of material available to make a strong showing of mitigating factors which might have persuaded the jury to impose a life, rather than death, sentence.

In analyzing the evidence on this issue, we are guided by *Adams v. Balkcom,* 688 F.2d 734, 738-740 (11th Cir., Oct. 8, 1982); *Proffitt v. Wainwright,* 685 F.2d 1227 (11th Cir., Sept. 10, 1982); *Young v. Zant,* 677 F.2d 792 (11th Cir., May 14, 1982); *Goodman v. Balkcom,* 684 F.2d 794 (11th Cir., Sept. 3, 1982); and *Washington v. Strickland,* 673 F.2d 879 (5th Cir., Unit B, April 23, 1982).

The evidence shows that the petitioner was remarkably uncooperative and uncommunicative with counsel, thus rendering difficult an "Informed evaluation of potential defenses to criminal charges and a meaningful discussion with one's client of the realities of his case. . . ." as mandated in *Gaines v. Hopper,* 575 F.2d 1147, 1149-50 (5th Cir.1978), rendering evidence and information adduced from others more important. With respect to mitigating circumstances to be presented at a sentencing hearing, this information would necessarily have come from friends, relatives and acquaintances. This required investigative activities, obviously, to uncover. Thus, in this case, pretrial investigation and preparation preeminently was the key to effective representation. *Rummel v. Estelle,* 590 F.2d 103, 104 (5th Cir.1979). Having in mind the proposition that we cannot judge whether the legal assistance afforded was or was not adequate by hindsight, *Adams v. Balkcom, supra,* 688 F.2d 758, we think, and hold, that, even considering the date of trial (March 1976) when the law of effective

assistance at a sentencing hearing was only in its infancy, nevertheless, considering the totality of the circumstances in the entire record, the assistance at this Cobb County trial fell short, and petitioner did not receive the effective assistance of counsel at that trial.

Issue Ten (Forsyth County)

Petitioner contends that at his Forsyth County trial he did not have the effective assistance of counsel required by the Sixth, Eighth, and Fourteenth amendments to the United States Constitution.

The thrust of petitioner's argument here is likewise directed towards preparation of and presentation of evidence at the bifurcated sentencing place of his trial.

[13] Guided by the same legal authority and mandates as set forth with respect to Issue Ten, the Court finds that the petitioner did secure the effective assistance of counsel at the Forsyth County trial, recognizing that the end product and result were the same, but feeling that the search for such evidence was adequately made, and the decisions as to use and non-use based on rational trial strategy for which an attorney cannot be faulted, just as we feel that in the Cobb County case the ultimate sentencing trial strategy was based on ignorance, not on the weighing of different courses of action.

Issue Eleven (Cobb County)

[14] Petitioner contends that at his Cobb County trial he was denied due process of law and the right to a rational sentencing procedure by the presentation of inflammatory hearsay testimony alleging Potts had committed previous homicides.

The evidence complained of was admitted at the guilt/innocence phase of the trial. The Supreme Court of Georgia has held that to be appropriately admitted as "res gestae." *Potts v. State, supra,* 241 Ga. 73, 243 S.E.2d 510. This Court agrees. Petitioner's contention under Issue Eleven is rejected.

Issue Twelve (Forsyth County)

[15] Petitioner contends that the prosecutor's recital to the jury from the United States Supreme Court and Georgia Supreme Court cases during the penalty phase of his case violated his right to a rational sentencing hearing and right to due process of law as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

In addition to reading excerpts from *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the prosecutor also read from *Eberhart v. State,* 47 Ga. 598, 610 (1872):

> MR. MILLS (Reading): We have no sympathy with that sickly sentimentality that springs into action whenever a criminal at length is about to suffer for a crime. This may be the sign of a tender heart, but it is also a sight of one not under proper regulation. Society demands that crime be punished, and that criminals be warned, and the false humanity that shudders when justice is about to strike is a dangerous element for society. We have too much of this mercy. It is not true mercy. It only looks to the criminal. We must insist upon the mercy to society and upon justice for the poor woman whose blood cries out against her murderers. That criminals go unpunished is a disgrace to our civilization. We have reaped the fruits of it in the frequency with which bloody deeds occur. A stern, unbending, unflinching administration of penal laws

> without regard to position, or sex, as it is the highest mark of civilization, also is the surest mode to prevent the commission of offense. (Tr. Forsyth Co. 928).

Jackie Potts's defense attorney made a timely objection to the prosecutor's recital from this case. Tr. Forsyth Co. 928.

The Georgia Supreme Court has held that the State's practice of reading passages from *Eberhart* with the purpose of influencing the jury to impose the death penalty is improper and disapproved. *Hawes v. State,* 240 Ga. 327, 240 S.E.2d 833 (1977).

The prosecutor defended his actions on grounds that the suggestive quotations were addressed not to the jury, but to the "court" (Tr. Forsyth Co. 927): "I am not addressing this to the issue of punishment. I am addressing it solely to the issue of duty to the law and duty to the public."

There was no point in reading the selected passages to the Court. They obviously were not meant to influence his charge to the jury or performance of other judicial duty. But they clearly were intended to influence the jury despite counsel's representations to the contrary, and being cases from eminent benches, read with the apparent approval of the Court where the jury could observe and hear, could be expected to influence them—towards death, not life imprisonment.

The sentencing phase of a capital punishment case, as now conducted pursuant to U.S. Supreme Court opinions, is a delicate process in which the jury must be equitably informed of its duties and options. The effect of reading from *Eberhart,* particularly, was to attempt to give judi-

cial imprimatur to the *lex talionis* as to a verdict which could legally be based only upon clearly understood options, and only the evidence in the case. We believe the reading of *Eberhart* was highly improper, and may have affected the delicate constitutional balance required by the Supreme Court. Therefore a new sentencing hearing is required.

Conclusion

For the reasons set forth hereinabove, the sentence in Case No. C80-1078A—Cobb County—is vacated, and the case remanded to Cobb County Superior Court for new trial as to all issues, guilt/innocence and penalty, within 180 days of the date of this order, failing which petitioner shall stand acquitted.

With respect to the Forsyth County case, Civil Action No. C80-50G, in the Gainesville Division of this Court, the sentence of death is vacated, and the matter remanded to Forsyth County Superior Court for resentencing consistent with the findings and conclusions of this Court, within 120 days, failing which petitioner shall stand sentenced to life imprisonment on the Forsyth County charge.

APPENDIX D

Jack Howard POTTS,
Petitioner-Appellant,

v.

Walter ZANT, Warden, Georgia Diagnostic and Classification Center,
Respondent-Appellee.

Jack Howard POTTS,
Petitioner-Appellant,

v.

Sam AUSTIN, Respondent-Appellee.

Nos. 80-7476, 80-7477, 80-7664 and 80-7665.

United States Court of Appeals, Fifth Circuit.
Unit B

Feb. 17, 1981.

Rehearing and Rehearing En Banc
Denied March 23, 1981.

Petitioner appealed from an order of the United States District Court for the Northern District of Georgia, William C. O'Kelley, J., 492 F.Supp. 326, as well as another order by that same court which dismissed his first and second sets of federal habeas petitions respectively. The Court of Appeals, R. Lanier Anderson, Circuit Judge, held that: (1) knowing and intelligent waiver of petitioner's federal habeas corpus rights did not render a subsequent identical petition an abuse of the writ, without regard to any justifiable reasons petitioner may have had for his initial waiver or subsequent petition, and (2) district court erred in denying petitioner, whose request for withdrawal of his first habeas petition was granted, an evidentiary hearing after he filed second identical petition

so as to afford petitioner an opportunity to rebut and explain any allegation of abuse and to determine whether his initial abandonment of first petition was knowing and voluntary.

Affirmed in part and vacated and remanded in part.

Lewis R. Morgan, Circuit Judge, filed a dissenting opinion.

Thomas A. Clark, Circuit Judge, filed specially concurring opinion.

Before MORGAN, ANDERSON and THOMAS A. CLARK, Circuit Judges.

R. LANIER ANDERSON, Circuit Judge:

Appellant Jack Howard Potts was sentenced to be executed pursuant to two convictions: one for kidnaping with bodily injury and the other for first degree murder. He brings this appeal of four consolidated petitions for habeas corpus, claiming he has been improperly denied federal review on the merits of his claims. The unusual factual circumstances surrounding Potts' filing of these petitions requires this panel to examine important questions concerning abuse of the writ of habeas corpus. Because we find that the district court should have granted a hearing on the issue of abuse, and because we find that in cases numbered 80-7476 and 80-7477 the district court applied an improper standard, we vacate the decisions in those cases and remand for further hearings. With respect to cases numbered 80-7664 and 80-7665, we affirm the district court's order dismissing, at Potts' request, the petitions filed in those cases.

FACTS

Because of the difficult question we must address here concerning abuse of the writ, a full statement of the unusual procedural history in these cases is necessary.

Potts's federal habeas petitions attack both convictions and sentences. Both convictions arose out of a single incident in which Potts allegedly kidnapped Michael D. Priest in Cobb County, Georgia, drove Priest to Forsyth County, Georgia, where Potts allegedly shot and killed Priest.

On March 11, 1976, Potts was convicted of kidnapping with bodily injury and armed robbery in the Superior Court of Cobb County, Georgia, and death sentences were imposed for each of those offenses. Four months later, on July 14, 1976, Potts was convicted for the murder of Priest in the Superior Court of Forsyth County, Georgia, and was sentenced to death pursuant to this conviction.

The two cases were consolidated for direct appeal to the Supreme Court of Georgia. On March 16, 1978, that court affirmed Potts' convictions and sentences with respect to the charge of kidnapping with bodily injury and murder, and reversed the sentence of death for armed robbery. *Potts v. State,* 241 Ga. 67, 243 S.E.2d 510 (1978).

Potts, in his brief to this court, alleges that after losing his direct appeal to the Supreme Court of Georgia, he desired to file a petition for writ of certiorari in the United States Supreme Court, but that his attorneys failed to do so.

On November 14, 1978, Potts filed a state habeas corpus petition in the Superior Court of Tattnall County,

Georgia, for both of his convictions and death sentences. After consolidated evidentiary hearings on January 22 and April 27, 1979, the superior court entered an order on July 24, 1979, denying Potts all relief. On August 9, 1979, Potts applied for a certificate of probable cause to appeal this denial of state habeas to the Supreme Court of Georgia.

Before any action was taken on his appeal of the denial of state habeas, Potts discharged his attorneys and requested them to withdraw the application pending in the Supreme Court of Georgia. Potts has testified in a hearing on June 10, 1980, related to his first federal habeas petitions, that shortly before asking that his application be withdrawn, his attorneys told him there was no hope of success, but they could only prolong his case and hope that the death penalty would be abolished before completion of his appeals[1] (Tr., June 10, 1980, hearing p. 20). Counsel communicated Potts request to withdraw his application to the Supreme Court of Georgia. Potts himself wrote three letters to the Supreme Court of Georgia in November and December, 1979, and in January, 1980, reiterating his request that his applications be withdrawn. On January 8, 1980, the Supreme Court of Georgia denied Potts' motion to withdraw his appeal, denied his application for certifi-

1. We mention this fact for what light it may shed on Potts' subsequent actions with respect to his pursuit of collateral relief. Potts also testified, inconsistently, that his decision to withdraw his application for a certificate of probable cause was made before being told of the supposed hopelessness of his case by his attorneys. (Tr. June 10, 1980, hearing, p. 20).

cate of probable cause for habeas corpus appeal, and granted the motion to discharge Potts' attorneys.[2]

An execution date was then set in both cases for February 13, 1980, Governor Busbee, acting upon a request from the Pardon and Parole Board, granted a 90-day stay pending clemency consideration. Potts did not initate or seek this review by the Pardon and Parole Board. In his brief to this court, Potts alleges without contradiction from the state that he declined to cooperate with attorneys seeking to pursue clemency with the Pardon and Parole Board on his behalf. After a proceeding on April 24, 1980, at which Potts was unrepresented, clemency was denied on May 1, 1980. An execution date was then reset in both cases for June 5, 1980.

On June 3, 1980, the Reverend Murphy Davis and other individuals, in an attempt to stay Potts' imminent execution, filed two "next friend" habeas corpus petitions in both cases in the United States District Court for the Northern District of Georgia. Potts in no way participated or consented to the filing of these petitions. After a hearing on June 4, 1980, in which testimony by a psychologist was taken, documentary evidence was viewed, and a video tape of a press conference held by Potts on June 2, 1980, was reviewed, the district judge dismissed the action, finding that the petitioners were not proper next friends and that Potts was competent.[3] At approximately 6:50 P.M. on June 4, this court entered an order denying the next

2. There is no claim by the state that Potts has failed to exhaust state remedies with respect to the issues raised in his habeas petitions now on appeal. Nor is there any claim that Potts has attempted to deliberately by-pass any state review procedure, either on direct appeal or an collateral attack.

3. Judge O'Kelley entered this order sometime in the afternoon of June 4, 1980, although the record is unclear as to exactly when.

friends' applications for a stay of execution pending appeal. *Davis v. Austin*, Nos. 80-7418 and 80-7419 (5th Cir. June 4, 1980).

At approximately 7:15 P.M. on that same day, June 4, the judge received notice by telephone that Potts had signed an authorization for Messrs. Millard Farmer, Andrea Young, and Joe Nursey to act as his attorneys and to file for the first time with his authorization two § 2254 petitions attacking his two convictions and sentences.[4]

When this telephonic notice was received, Potts' scheduled execution was less than 15 hours away. The judge immediately granted stays of the execution. The state did not contest these stays.

Potts' intention to pursue federal habeas was apparently short-lived. Late in the afternoon on June 6, 1980, the district court received a letter written earlier that day by Potts, in the presence of his mother, in which he asked that his habeas petitions be withdrawn.[5] The letter, not

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4. These two petitions are numbers 80-7664 and 80-7665 on appeal to this court.

5. The letter, with Potts' grammatical errors, reads as follows:

Dear Judge O Kelly

Sir i wrote a note to you requesting to appeal and you granted a stay. at the time i asked for the new appeals i was with my brother, the only reason i asked for the appeal was to satisfy my brother who i love very much. Judge, i had no idea the stay would be granted, i knew you had refused a last final appeal, so i truly thought that by writing the note in my brothers presence the only thing it would accomplish would be to set his mind at ease so he (my brother) could know without a doubt he had done all he could do for me. Judge O Kelly i am asking you to let me (if its my right) with-

(Continued on following page)

surprisingly, is emotional, yet articulately phrased. In it, Potts stated that the only reason he authorized the filing of the § 2254 petitions was to set his brother's mind at ease so that his brother could believe that he had done all

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(Continued from previous page)

draw the appeal. I realize Millard Farmer will only continue to use me and my situation if you fail to help me now. i beg you to please let me withdraw the appeal as quickly as possible! Let me get a date set immediately and most of all let me die while in a state of grace! And could you issue an order that i refuse to see any reporters or news people. Judge O Kelly i am giving this letter to my mother who will forward it to you today 6/6/80. I assure you Judge i am sound of mind and body, but i must be able to withdraw the appeal and i do now, as of today refuse the help of Millard Farmer and Andrea Young. and i refuse to speak with them. God Bless you Judge for your kind and considerate cooperation.

/s/Jack H. Potts
69124—4th Floor
Reidsville, GA.
6/6/80

June 6, 1980
Witnessed:

/s/Mrs. Carolyn Potts (Mother) June 6, 1980. Attached to the letter was a third page, reading as follows:

(1) No reporters to be let in to Reidsville [the prison in which Potts was incarcerated] to see me.

(2) No moving me back and forth from Reidsville Prison to Jackson Prison.

(3) An immediate date to be set so the circus atmosphere will not have the chance to begin.

(4) Please accept my apology for having caused you problems in this, Judge.

(5) Every thing is prepared here at Reidsville for an execution if an immediate date is set.

/s/Jack H. Potts
6/6/80

he could for Potts. Potts further stated that at the time he authorized the filing of his § 2254 petitions, he did not believe that a stay would be granted since he knew of the court's prior refusal of a "last final appeal."[6] Potts requested that his petition be withdrawn as quickly as possible so that he could die while "in a state of grace." Potts further requested that he be allowed to dismiss his attorneys and that the court order that he be permitted to refuse to see reporters or news people. Potts assured the court that he was of sound mind and body. At the end of the letter on a third page were five items, some of which were requests. Potts specifically asked that an immediate date for execution be set.

During the weekend after June 6, Potts' attorneys attempted to convince Potts to continue with his habeas corpus action and their representation of him. Because the district court refused to dismiss Potts' petition on the basis of the letter transmitted by Potts' mother, the district court met on June 9 with Potts' attorneys and representatives of the Georgia Attorney General's office to establish a procedure to determine whether or not Potts' petitions would be withdrawn. The district court proposed that Potts be brought to the court in order that the court could address him personally and suggested that the court follow a procedure analogous to acceptance of a plea of guilty under Rule 11 of the Federal Rules of Criminal Procedure. All counsel concurred in the court's proposed approach.

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6. The letter does not state which appeal this was, but presumably Potts is referring to the "next friend" petition rejected by the district court on June 4, as this is the only federal petition filed with respect to Potts' case before he authorized the first set of petitions.

The court further proposed that a court-appointed psychiatrist be present at the hearing for the purpose of rendering his opinion as to Potts' competency at the time of the hearing. Counsel also agreed with this procedure. Because Potts had expressed in his letter to the court that he would thereafter refuse the help of his counsel and desired not to talk with them further, Potts' attorneys agreed that they should not act as counsel at the hearing but that the court should conduct the proceedings.

On June 10, 1980, a hearing was held with Potts present and his attorneys also in the courtroom. The district court commenced the hearing by advising Potts that his attorneys of record had not been relieved by the court and that he had a right to be represented at the hearing by counsel of record or another attorney. Potts indicated that he did not desire his attorneys of record or any other attorney to represent him. Potts then took the witness stand and was sworn in. Potts was warned by the court that he had a right to refuse to answer any question that would be incriminating. The court thereupon proceeded to question Potts concerning his request to withdraw his habeas corpus petitions. After establishing that Potts had written the letter the court received on June 6, the court asked Potts why he wished to withdraw his petitions. Potts replied,

> I was tried by a jury of twelve men and women. I have been found guilty of murder, a murder I committed. I could argue the Constitutional laws that may have been overlooked or misused or whatever but I see no sense in going on further and further, year after year, and probably end up dying in the electric chair anyway.
>
> I did not want to change my mind this past Thursday but, as I said in the letter, it's, it would have been very

hard on my brothe to see me die and thinking he could have done sor thing else for me so now that he can leave it that, y a know, he did what he could do and now he will be satisfied. I hope he can live with that.

(Tr., June 10, 1980, hearing, pp. 10-11).

The court thereupon questioned Potts as to whether he had been threatened or coerced to withdraw his petitions.

Q Has anyone in any way threatened you to get you to withdraw—

A Definitely not.

Q —this appeal?

A No, sir, Judge.

Q Has anyone tried to coerce you into changing your mind?

A No one has said anything about would you do it or would you not do this. I have had people ask me would you not do it but no one has coerced me into doing this. I made this decision on my own.

Q Has anyone at all tried to get you to in any way withdraw your habeas corpus actions?

A No, no one has done that. This is my decision.

Q Has any force been used against you to get you to change or in any way make your life such that it would be more miserable for you if you didn't change your mind?

A Your Honor, when I asked, requested for this appeal, I knew that I, there would be some things that I would go through that any man would in prison because of just human feelings. Some people wanted me dead. Some wanted me alive but I made this decision and I'm asking the Court—and I did not do anything to make a mockery of the judicial system. I did it on the grounds like I told you in the letter. That's the only reason I did it. That the only reason I asked for the appeal.

(Tr., June 10, 1980, hearing, pp. 12-13).

The court then questioned Potts as to the appeals he had previously brought with respect to his convictions and sentences. Potts was knowledgeable of the course of his case through the state courts.[7] He testified that he had read the § 2254 petitions filed in federal court, but was somewhat confused as to whether they raised the same claims presented in the state courts.

The court then questioned Potts to ascertain whether he understood the significance of dismissing his federal habeas petitions.

Q The action you are requesting, do you realize would be an abandonment of certain Constitutional, claims of certain Constitutional violations? Do you understand that?

A Yes, sir.

Q And do you understand that, as I mentioned earlier, there is the direct appeal, there is the opportunity to make a State habeas corpus, a State habeas corpus attack, collateral attack upon a

7. Potts expressed his belief that a petition for writ of certiorari had been filed with the United States Supreme Court on his direct appeal. Lawyers present at the hearing informed the district court this was not true. When the district court informed Potts of a possible error in his memory of the course of his direct appeal, Potts stated it did not matter to him whether or not certiorari had been carried to the U.S. Supreme Court. (Tr., June 10, 1980, hearing, pp. 36-37).

conviction and once that has been exhausted, one may then through the Federal courts file habeas corpus, making claims of Constitutional violations that have been already been made before the State court and you can only make them in Federal court if you have exhausted State court remedies? Do you understand that?

A Yes.

Q Now, it appears that you previously have taken your direct appeal through the Georgia Supreme Court to the U. S. Supreme Court and that you had your State habeas corpus to the Tattnall Superior Court and to the Georgia Supreme Court.

A (Nods head affirmatively.)

Q And that the third and last of those forms of attack you now are in; that is, in the United States District Court claiming certain Constitutional violations. Do you understand that?

A Yes.

Q Do you understand that if you dismiss or abandon this, you have abandoned your last available attack upon your conviction and sentence?

A I'm well aware of that.

. . . . .

Q Do you have any question of the Court concerning this matter or the effect of your withdrawal or abandonment of this action?

A No.

. . . . .

Q And you want both these habeas corpus cases dismissed?

A Yes, sir.

Q You realize if I dismiss those, then you have nothing from which to appeal to the Court of Appeals for the Fifth Circuit or to the United States Supreme Court?

A Yes, sir.

Q Do you realize the consequences of that would be that you would be remanded to the State prison for resentencing by the two superior courts involved?

A Yes, sir.

(Tr., June 10, 1980, hearing, pp. 22-25).

The court thereupon gave the attorneys for the state and Potts' attorneys an opportunity to say anything or to request the court to ask any question of Potts. At that time they made no requests for additional questions to be posed to Potts.

After Potts had finished testifying, the court placed on the stand a psychiatrist, Dr. Davis, who had been in the courtroom observing Potts during the hearing. Dr. Davis testified he had no previous contact with Potts but that, based on his observation during the hearing, Potts understood the nature of his request and the consequences of it. Dr. Davis stated he could observe nothing which would cause the court concern about Potts' competence.

A short recess was taken after the testimony of Dr. Davis, at which time Potts' attorneys requested the court to question Potts concerning destruction of certain personal effects in prison about which they had heard. When the hearing reconvened, the court questioned Potts concerning this matter.

Q Mr. Potts, I am not going to call you back to the stand but I do want to make sure I understand one other thing that has been suggested by the attorneys and while I do not have full knowledge of everything that has been reported by the media,

apparently there has been reports in the media of some destruction of religious objects of yours and some other treatment of you at Reidsville and that this had a bearing upon and was the reason you wrote the letter you wrote and are changing your mind. Is that correct, sir?

A The reason I changed my mind, Your Honor, was the reason I told you in that letter.

Whatever else happened, which some things did happen and I wish that you could help make sure they don't happen anymore these last few days but that's not the reason I changed my mind. My letter is the reason I changed my mind, I told you in the letter.

Q Have you told Ms. Nicholson or other persons that the reason you were doing this was because of acts taken against you by the guards or prison officials?

A No, I did not say that's the reason.

(Tr., June 10, 1980, hearing, pp. 35-36).[8]

On June 13, 1980, the district court entered an order dismissing Potts' petitions. When this order was entered, the state had not filed any responsive pleadings and the order in no way addressed the merits of Potts' claims. The court found that Potts was fully competent to make the decision to abandon further legal proceedings and further found that his requests were clear and were not the product of mental incompetency or coercion. The court directed

8. This panel commends Judge O'Kelley's decision to use a procedure analogous to Fed.R.Crim.P. 11 for accepting a guilty plea to determine whether Potts genuinely desired to withdraw his habeas petitions. His action reflects a compassionate, humane concern to ascertain Potts' true intentions with respect to his first habeas petitions. His questioning of Potts was thorough.

that Potts' attorneys be stricken as counsel of record and dissolved the stay of execution. With the stay dissolved, Potts' execution was rescheduled for July 1, 1980.

On June 25, 1980, the district court received a telephone call from Mr. Joe Nursey, who was counsel of record in the previously dismissed petitions, indicating that Potts had authorized the filing of a second set of petitions for writs of habeas corpus. Since only a few days remained before the scheduled execution, the court requested that Mr. Nursey deliver the pleadings to Gainesville, Georgia, where the court was holding a civil trial. Upon arriving, Mr. Nursey indicated that he had unintentionally misled the court and that he was not authorized to file the actions until the following morning so that Potts could contact a family member prior to that time. After the court indicated to Mr. Nursey that trifling with the court would not be countenanced, Mr. Nursey proceeded to file the actions at that time. The two petitions filed on June 25 are essentially identical to the first two petitions.[9] The petitions filed on June 25 contain additional material relating to the events surrounding the filing of his first set of habeas petitions and his quick withdrawal of those petitions. The June 25 petitions alleged that the reason Potts withdrew his prior petitions was depression he suffered resulting from "exceptional harassment by prison officers," discontent of family members at the prospect of his continued incarceration,[9a] and the "circus atmosphere" surrounding

9. The petitions filed on June 25 are numbers 80-7476 and 80-7477 on appeal to this court.

9a. In his brief to this court, Potts alleges that his mother was displeased with his decision to appeal and told him he had done the wrong thing by not going through with the execution.

his case. The substantive issues raised in the second set of petitions are verbatim identical with those raised in the first set of petitions. Potts raises several serious allegations of constitutional impropriety with respect to both his convictions and sentence.[10]

With the filing of the second set of petitions, the court scheduled a hearing for the next day, June 26, to determine whether the subsequent petitions should be entertained and a stay granted. Because of confusion as to whether Potts had authorized this second set of petitions, the court and counsel for both sides called the warden of the Georgia Diagnostic and Classification Center where

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10. With respect to his conviction in Cobb County for kidnapping with bodily injury, armed robbery, and aggravated assault, Potts claims (i) faulty jury instructions; contributing to conviction of a capital crime and constituting deprivation of due process, (ii) state's knowing refusal to correct witness's testimony which would otherwise impeach the witness, (iii) improper admission of hearsay evidence of prior crimes, (iv) improper closing argument, (v) failure to change venue for prejudicial pre-trial publicity, (vi) cruel and unusual punishment im imposing death penalty for kidnapping, (vii) improper removal of veniremen with scruples concerning capital punishment, (viii) denial of due process by failure to state aggravating circumstances within indictment, (ix) arbitrary and capricious application of Georgia's death penalty, (x) no theoretical justification for death penalty, (xi) excessiveness of sentence considering all circumstances surrounding crime, (xii) inadequacy of appellate review in Georgia of capital cases, and (xiii) cruel and unusual means of execution in Georgia.

With respect to his conviction for murder in Forsyth County, Potts makes essentially the same claims as numbers (vii), (viii), and (ix)-(xiii) of the petition relating to the Cobb County conviction, plus claims of double jeopardy, possible reliance on improper aggravating circumstances by the jury, sufficient evidence to establish insanity defense, and failure of the district court to instruct on mitigating circumstances.

Potts was being held to determine if Potts had authorized the filing of the petitions. The warden, after talking with Potts, indicated to the court and counsel that Potts had denied authorizing the petitions. Faced with Potts' conflicting actions, the court directed Potts to be present at the June 26 hearing.

At the June 26 hearing, the court informed Potts that the only reason he was present was to ascertain whether he had indeed filed a second set of petitions and whether he wished to be represented by an attorney. Potts indicated that he wished to talk with a lawyer before he indicated whether he did authorize the filing of the second set of petitions, but that he did not wish to confer with Mr. Nursey. Potts indicated he wished to be represented by a Mr. Goldberg and a Mr. West. After conferring with Goldberg and West, Potts indicated that he desired they represent him in the proceeding and that he did authorize the filing of the second set of habeas corpus petitions. Mr. Goldberg and West subsequently indicated that Potts also wished Mr. Nursey to represent him. The court thereafter did not question Potts although he was present throughout the hearing, but instead, received legal arguments on whether there had been an abuse of the writ of habeas corpus and whether the dismissal of the prior petitions had been with or without prejudice.

Although the district court indicated the hearing would be devoted solely to legal questions, Potts' attorneys made clear they were prepared to present evidence which would explain why Potts was filing a second set of petitions and which would demonstrate the involuntariness of his withdrawal of his first set of petitions. Potts' attorneys alleged that Potts was filing his second set of petitions be-

cause he had indeed changed his mind. In an offer of proof, based on the brief interview with Potts at the initiation of the hearing, Potts' attorneys offered to place Potts on the stand to explain why he was filing his second set of petitions. Potts' attorneys further stated that Potts was prepared to testify that the reason he gave up his earlier appeals was that he was afraid of the consequences and retaliation that he would suffer from prison authorities by reason of his pursuing his habeas petitions. Also, he would testify that he was afraid to continue to live under the conditions that he saw as being brutal, cruel and unusual, including his medical treatment.[11] They alleged Potts had reached a state of mental fatigue after filing his first set of petitions because of conditions at the institution where he was kept. They also alleged that when Potts filed his first set of federal habeas petitions, he was harassed by prison authorities, but when he withdrew the first petition, his treatment improved considerably. They further alleged that conditions under which Potts had been incarcerated for the past five years precluded anyone from making a valid waiver of a constitutional right. Potts' attorneys had present at the hearing experts who would testify as to Potts' mental state at the time he withdrew his first petitions and on his mental condition with respect to any issue of waiver or bypass or deliberate successive petitions. Potts' attorneys stated they were not alleging that Potts was not competent, but were alleging that there were "other pressures put on Mr. Potts and everyone else on death row that make them make decisions that are some-

11. In his brief to this court, Potts alleges inadequate medical treatment for a bullet wound received when he was captured, as well as constant pain from the wound.

times contradictory." Despite offering to place this evidence in the record at the hearing, the court refused to take any testimony.[12]

In an order dated June 26, 1980, the district court refused to stay Potts' execution and dismissed his second set of habeas petitions. The court held that abandonment at the federal habeas level, by itself, is sufficient to render any subsequent petition an abuse of the writ. The court prefaced its June 26 order by describing the June 10, hearing:

> Because of the potential finality of Mr. Potts' requests [to dismiss his first petitions] and to ensure that Mr. Potts' decision to abandon further legal action was made knowingly and intelligently, the court conducted a hearing on June 10, 1980, to determine if Mr. Potts had made a competent decision to abandon his right to federal habeas corpus review.

The court continued, quoting from *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963):

> [A] waiver may also be present
>
> if . . . the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus review requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

Id. at 18, 83 S.Ct. at 1078.

12. The state did not deny these factual allegations but has had no opportunity to do so. Thus, the record with respect to the second set of petitions contains allegations of factual matters going to the issue of abuse and to the voluntariness of Potts' withdrawal of his first set of petitions with no substantive evidence tending to confirm or deny these allegations.

The continued vitality of *Sanders* is demonstrated by the recent decision in *Paprskar v. Estelle,* 612 F.2d 1003 (5th Cir. 1980) [*cert. denied* — U.S. —, 101 S.Ct. 239, 66 L.Ed.2d 111 (1980)]. Although the court determined that no abuse of the writ was presented by that case, it reaffirmed the requirement that where there has been " 'an intentional relinquishment or abandonment of a known right or privilege,' " which a petitioner subsequently attempts to raise, an abuse of the writ is present. *Id.* at 1006, *quoting Fay v. Noia,* 372 U.S. 391, 439 [83 S.Ct. 822, 849, 9 L.Ed.2d 837] (1963).

From the evidence presented in the 'next friend' actions brought on Mr. Potts' behalf and in the proceedings concerning Mr. Potts' prior petitions, the court is compelled to find that there was an intentional, knowing, and unequivocal relinquishment of a known right which constituted a waiver of federal habeas corpus review . . . . That there was a waiver and an abandonment is established beyond a cavil.

The court further stated,

> If ever there is a situation where a finding of an intentional abandonment of a known right is demanded, this case presents it. By the same token, seeking another stay and consideration of substantively identical petitions constitutes an abuse of the writ as defined by *Sanders v. United States,* [373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963)]. Having brought Mr. Potts before the court on those petitions for no purpose other than to determine whether or not he desired federal habeas corpus review, and having determined that he wished to abandon that right, the court determined that the matter was final . . . . Mr. Potts' decision was not simply a voluntary dismissal without prejudice; it was a final abandonment of a known right to federal review of his state convictions and sentences of death.

The district court made no findings as to the motive or reasons behind Potts' actions. Although noting that there is no present requirement that a habeas corpus petitioner make even a colorable claim of innocence, the district judge cited Potts' admission of guilt as a cumulative reason supporting the finding of abuse of the writ.

This court thereafter granted stays of execution on June 28, 1980, with respect to Potts' second set of petitions (numbers 80-7476 and 80-7477) and directed an expedited appeal. On July 1, 1980, the Supreme Court of the United States rejected the state's application to vacate the stays in *Zant v. Potts,* — U.S. —, 100 S.Ct. 3052, 65 L.Ed.2d 1138 (1980).

On July 7, 1980, Potts' attorneys took the unusual step of filing a notice of appeal with respect to the first set of habeas petitions (numbers 80-7664 and 80-7665). The district court denied Potts a certificate of probable cause with respect to these petitions, finding that no useful purpose would be served by allowing an appeal in those cases since, if Potts were successful in his appeal on the second set of petitions, the same issues would then be before the court for consideration on the merits. Potts then applied to this court for a certificate of probable cause to appeal and filed a motion for leave to proceed on appeal in forma pauperis. Potts explained that a certificate of probable cause with respect to the first set of habeas petitions was requested only as a precautionary measure. Potts' counsel explained that should a court find the dismissal in the first set of petitions to be something other than a voluntary dismissal pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, an appeal with respect to these petitions would be necessary. This court granted Potts' application for a

certificate of probable cause and for leave to appeal in forma pauperis and ordered those appeals to be consolidated and expedited with the appeals in numbers 80-7476 and 80-7477.

ANALYSIS OF FACTS AND QUESTION PRESENTED

Although Potts has in the course of these cases filed a total of four habeas corpus petitions, we consider for purposes of applying the abuse doctrine, as did the district court, that this case is equivalent to the more typical situation where a second petition is filed which makes the same claims as an earlier petition.[13] Two petitions were filed on June 4, one for the conviction in Cobb County and one for the conviction in Forsyth County, Georgia. They were consolidated. Similarly, the two petitions filed on June 26—each relating to one conviction—were consolidated. For convenience, we will often describe the first two petitions filed on June 4, as his first habeas petition, and the last two petitions filed on June 26, as his second habeas petition.

As we read the district court's order, the court there found an abuse of the writ with respect to the second petition on the sole ground that Potts had abandoned all rights to future federal habeas when he dismissed his first petition.[14] Potts' request for an evidentiary hearing to rebut the allegation of abuse was refused. The court made no finding with respect to why Potts brought and then dismissed his first petition or why he was filing his second petition. Nor did the district court make findings as to Potts' motives with respect to the two sets of petitions or with respect to any bad faith or purpose to vex or harass the court or to delay his execution by piecemeal litigation. Nor did the court address any equitable considerations or make any findings as to whether the ends of justice would be served by addressing Potts' second petition. The only factual finding by the court was that Potts' alleged abandonment on June 10 was knowing and voluntary. It deemed

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13. Both the state and the district court made clear at the June 26 hearing, and we agree, Potts cannot be held responsible for the "next friends" petition filed in his behalf as far as determining the number of petitions he has filed.

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14. Arguably, the district court gave two other grounds for finding an abuse. At one point, the district court noted, "By the same token, seeking another stay and consideration of substantively identical petitions constitutes an abuse of the writ . . . ." Insofar as the district court indicated by this that the filing of a second petition raising the identical grounds is *per se* an abuse of the writ, the court was mistaken.

> This Court has consistently interpreted the habeas corpus statutes as imposing no numerical limits on a state prisoner's access to the federal courts . . . . Instead, we have held that summary consideration of a petition is the appropriate remedy when an applicant seeks to relitigate a claim . . . . [T]o equate the filing of successive petitions with an 'abuse' of habeas is to misunderstand the extraordinary nature of the writ.

Hardwick v. Doolittle, 558 F.2d 292, 296 (5th Cir. 1977), *cert. denied* 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 (1978) (citations omitted).

Another ground arguably relied upon by the district court for finding an abuse was Potts' admission of guilt. Because the court cited this ground as being only cumulative of the abandonment ground, and because the state has not asserted this ground on appeal, we decline to consider it. *See Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979).

no other findings necessary to find an abuse with respect to the second, identical petition.

On appeal, Potts raises three substantive issues we must address. First, whether Fed.R.Civ.P. 41(a) was applicable to Potts' dismissal of his first petition so as to give him a right to dismiss his first petition without any procedural prejudice attaching to his claims. Second, whether an intentional and knowing waiver and abandonment of all rights to future federal habeas, made at the federal habeas level before any evidentiary hearing or response from the state, is alone sufficient to find an abuse with respect to a subsequent federal habeas petition raising the same issues. Third, whether the district court erred in denying Potts an evidentiary hearing after he filed his second habeas on the questions as to why he filed and dismissed his first petitions and whether his alleged intentional and knowing abandonment on June 10 was voluntary. We first discuss briefly the historical background of the abuse of the writ doctrine before discussing the issues.

LEGAL BACKGROLND

[1] The doctrine of abuse of the writ has developed as a result of the familiar rule of law that a denial of an application for habeas corpus is not *res judicata* with respect to subsequent applications. *Sanders v. United States,* 373 U.S. 1, 7, 83 S.Ct. 1068, 1072, 10 L.Ed.2d 148, 156 (1963); *Fay v. Noia,* 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); *Salinger v. Loisel,* 265 U.S. 224, 230, 44 S.Ct. 519, 521, 68 L.Ed. 989 (1924). The Supreme Court has indicated that the inapplicability of *res judicata* to habeas has roots within our jurisprudential system based upon our

concern that neither life nor liberty be deprived unconstitutionally:

> Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If 'government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment,' *Fay v. Noia, supra* (372 U.S. at 402), access to the courts on habeas must not be thus impeded. The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ.

Sanders v. United States, 373 U.S. at 8, 83 S.Ct. at 1073.

Because of the inapplicability of *res judicata* to habeas corpus, prisoners have in the past frequently filed successive petitions, alleging claims already adequately determined in prior petitions, or alleging different claims which could have been adequately pleaded and adjudicated in prior petitions. In order to curb the opportunity for prisoners to file nuisance or vexatious petitions, and to ease the burden on the courts arising from such petitions, guidelines have evolved as to when a district court, in the exercise of its sound judicial discretion, may decline to entertain on the merits a successive or repetitious petition. These guidelines reflect a concern that in the absence of abuse, a federal habeas court will adjudicate at least once the claims of a petitioner.

At present there are two statutes governing the discretion of a trial court to decline a § 2254 petition by a state prisoner.[15] First enacted was 28 U.S.C.A. § 2244(b) (West

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15. There are three statutes touching on the discretion of a trial court to decline to address successive or repetitious post-

(Continued on following page)

1971), which reads:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

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conviction petitions from federal prisoners. 28 U.S.C.A. § 2244(a) (West 1971); 28 U.S.C.A. § 2255 (West 1971); and Rule 9(b) of Rules Governing Section 2255 Proceedings for the United States District Courts, 28 U.S.C.A. foll. § 2255 (West 1980).

These three statutes also reflect a concern that in the absence of abuse, a federal court will adjudicate at least once the claims of federal prisoners seeking post-conviction relief. Section 2244(a) requires that the legality of the detention be "determined" on a prior application before a federal court may refuse to hear a subsequent application for habeas. Rule 9(b) says a federal court need not hear a successive § 2255 petition if a prior petition was determined "on the merits" or there is abuse with respect to a new claim raised. Section 2255 has the broadest language, stating that a successive § 2255 petition need not be heard if it asks for "similar relief." However, *Sanders* makes clear that a § 2255 petition is to be as readily available as an application for habeas and establishes guidelines for determining the discretion of federal courts to decline to hear successive § 2255 petitions. We discuss those guidelines more fully below.

The legislative history indicates that this statute was enacted to introduce a qualified application of the doctrine of *res judicata* to habeas corpus and arose out of a concern for the rapidly increasing number of meritless habeas petitions from state prisoners. S Rep.No.1797, 89th Cong., 2d Sess., *reprinted in* [1966] U.S.Code Cong. & Adm.News 3663. By its terms, it provides no authority to dismiss the instant petitions, since it authorizes a district court not to entertain a subsequent application only if there has been an "evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law." Here, the trial court has held no hearings with respect to the factual or legal claims alleged in Potts' petitions, nor has it relied or any findings by state courts in addressing factual or legal claims as it is authorized to do in certain circumstances by 28 U.S.C.A. § 2254(d) (West 1977).

The second statute applicable to a successive or repetitious petition is Rule 9(b) of Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C.A. foll. § 2254 (West 1977):

> Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

By its language, Rule 9(b) also does not apply since Potts' second set of petitions failed to allege new or different

grounds from his first petitions, and there was no determination on the merits of the first petitions.[16]

Although we have noted that the two statutes respecting successive petitions by state prisoners are not literally applicable to the instant case, we are not left without guidance since Rule 9(b) makes clear that it incorporates and preserves existing case law with respect to abuse of the writ. More specifically, as enacted by Congress, Rule 9(b) codifies the seminal case of *Sanders v. United States,* 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) with its guidelines concerning abuse of the writ. *Advisory Committee Note,* Rule 9, Rules Governing Section 2254 Cases in the United States District Courts (28 U.S.C.A. foll. § 2254); H.R.Rep.No.1471, 94th Cong., 2d Sess., 5-6, *reprinted in* [1976] U.S.Code Cong. & Adm. News, pp. 2478, 2482; *Paprskar v. Estelle,* 612 F.2d 1003 (5th Cir.), *cert. denied* — U.S. —, 101 S.Ct. 239, 66 L.Ed.2d 111 (1980); *Galtieri v. Wainwright,* 582 F.2d 348, 356 n.18 (5th Cir. 1978) (en banc).[17]

In *Sanders v. United States,* the Supreme Court addressed the question: in light of the inapplicability of *res judicata* to habeas corpus, what significance, in determining whether to entertain a subsequent petition, should a district court give to the denial of prior applications for habeas relief. Although *Sanders* was concerned with a

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16. We discuss more fully below at p. 744 why we conclude there has been no determination on the merits of Potts' claims.

17. It has been noted that § 2244(b) also has been interpreted as a codification of *Sanders. Paprskar v. Estelle,* 612 F.2d at 1006, n.11.

§ 2255 motion, the Court made clear that the principles it was there announcing concerning successive petitions applied generally to applications for federal habeas. 373 U.S. at 15, 83 S.Ct. at 1077. *See also Advisory Committee Notes,* Rule 9(b) of the Rules Governing Section 2254 Cases in United States District Courts (28 U.S.C.A. foll. § 2254); *Paprskar v. Estelle, supra.*

Sanders divided successive applications for habeas into two situations. The first classification specified the principles governing successive motions on grounds previously heard and determined:

> Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant to the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

Sanders v. United States, 373 U.S. at 15, 83 S.Ct. at 1077. Here, the notion of abuse of the writ does not arise. Instead, the court, in deciding whether to address a subsequent petition, ascertains whether there has been a determination on the merits and whether the ends of justice would be served by a redetermination on the merits. The criterion of the ends of justice typically involves looking at objective factors, such as whether there was a full and fair hearing with respect to the first petition, and whether there has been an intervening change in the law. 373 U.S. at 16-17, 83 S.Ct. at 1077-78. However, the Supreme Court was careful not to foreclose other factors which might be relevant in a determination of the ends of justice. *Ibid.*

[2] The second classification dealt with successive applications presenting different grounds from those presented in a prior application and with successive applications containing the same ground earlier presented but not adjudicated on the merits. It is with respect to this second classification that the notion of abuse of the writ is applicable. The Supreme Court stated that a district court can avoid full consideration of the merits with respect to the second type of application only if there has been an abuse of the writ. In discussing what constitutes an abuse of the writ, the Supreme Court stated:

> To say that it is open to the respondent to show that a second or successive application is abusive is simply to recognize that 'habeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 573 [73 S.Ct. 391, 397, 97 L.Ed. 549] (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. Narrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptionable.' *Fay v. Noia, supra* (372 U.S. at 438 [83 S.Ct. at 848]). Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, as in *Wong Doo* [*v. United States*, 265 U.S. 239, 44 S.Ct. 524, 68 L.Ed. 999] the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless

> piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

Sanders v. United States, 373 U.S. at 17-18, 83, S.Ct. at 1078-79.

Sanders also incorporated within the guidelines defining the nature of abuse of the writ the principles enunciated in *Fay v. Noia,* 372 U.S. at 438-440, 83 S.Ct. at 848-849, and *Townsend v. Sain,* 372 U.S. 293 at 317, 83 S.Ct. 745 at 759, 9 L.Ed.2d 770. *Sanders v. United States,* 373 U.S. at 18, 83 S.Ct. at 1078. The section of *Fay v. Noia* referred to by the *Sanders* Court announces the familiar rule that district judges may deny relief to an applicant who has deliberately bypassed the orderly procedure of state courts. The Court stated that definition of waiver enunciated in *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461—*i. e.,* the intentional relinquishment or abandonment of a known right or privilege—was one necessary element *inter alia* in finding a deliberate bypass. *Fay v. Noia,* 372 U.S. at 438-39, 83 S.Ct. at 848-49. The principle found in the section of *Townsend v. Sain* referred to by the *Sanders* Court states that if "for any reason not attributable to the inexcusable neglect" of a state petitioner, evidence crucial to adequate determination of the constitutional claim was not developed in state court, a hearing in federal court is compelled. *Townsend v. Sain,* 372 U.S. at 317, 83 S.Ct. at 1078.

Several broad principles in addition to those enunciated in *Sanders,* arising out of concern that abuse of the writ not become a substitute *res judicata,* have been enunciated in other cases. Within this circuit, we have concluded, "The 'abuse of the writ' doctrine is of rare and

extraordinary application." *Paprskar v. Estelle,* 612 F.2d at 1007; *Hardwick v. Doolittle,* 558 F.2d 292, 296 (5th Cir. 1977), *cert. denied* 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 (1978); *Simpson v. Wainwright,* 488 F.2d 494, 495 (5th Cir. 1973); *see also Galtieri v. Wainwright,* 582 F.2d 348, 368 (5th Cir. 1978) (en banc) (J. Goldberg, dissenting).[18] This circuit, amplifying on *Sanders,* has stated that the equities of the situation and the conduct of the petitioner are relevant to the determination of whether an abuse has occurred. *Paprskar v. Estelle, supra.* If a petitioner is able to present some "justifiable reason" explaining his actions, reasons which "make it fair and just for the trial court to overlook" the allegedly abusive conduct, the trial court should address the successive petition. *Price v. Johnston,* 334 U.S. 266 at 291, 68 S.Ct. 1049 at 1063, 92 L.Ed. 1356; *Paprskar v. Estelle, supra.*

Finally, and significantly, the Supreme Court in *Sanders* stated that no matter into which classification a successive petition fell, a district judge always has the discretion—and sometimes the duty—to reach the merits.

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18. The Supreme Court apparently attempted to increase the discretion permitted district courts to refuse to entertain successive petitions when it proposed the Rules Governing Section 2254 Cases. The Supreme Court's version of Rule 9(b) stated that a trial court need not entertain a successive petition alleging a new or different ground if failure to assert that ground in the prior petition was "not excusable." Congress, in enacting these proposed rules, changed the Supreme Court's language to "abuse of the writ" because of concern that the Supreme Court's language would give district courts too broad a discretion to dismiss successive petitions. H.Rep.No.94-1471, 94th Cong., 2d Sess., *reprinted in* [1976] U.S.Code Cong. and Adm. News 2478.

> The principles governing both justifications for denial of a hearing on a successive application are addressed to the sound discretion of the federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgement as to whether a second or successive application shall be denied without consideration of the merits. Even as to such an application, the federal judge clearly has the power—and, if the ends of justice demand, the duty—to reach the merits.

Sanders v. United States, 373 U.S. at 18-19, 83 S.Ct. at 1078-79.

WHETHER POTTS' ABANDONMENT WAS TANTAMOUNT TO RULE 41(a) DISMISSAL

[3] Potts raised a novel argument below, and before this court, that as a matter of law it is inappropriate for the court to apply the abuse of the writ doctrine in the context of this case. He contends that because the state had not filed any responsive pleadings at the time of his withdrawal of his first petitions, he had a right voluntarily to withdraw these petitions without any procedural prejudice whatsoever. He grounds his argument on Rule 11 of the Rules Governing § 2254 Cases (28 U.S.C.A. foll. § 2254) which reads,

> The Federal Rules of Civil Procedure, to the extent that they are inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

as well as upon Rule 41(a) of the Federal Rules of Civil Procedure, providing that a plantiff may dismiss an action

without order of the court and without prejudice by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgement, whichever occurs first. As with ordinary civil plantiffs, he maintains that as a habeas petitioner, he has a right to dismiss a habeas petition in these circumstances under Fed.R.Civ.P. 41(a) without any prejudice whatsoever attaching.

If Potts' position were correct, a habeas petitioner on death row could, with no fear of adverse effects, file a first petition immediately before his scheduled execution date and then subsequently dismiss the petition after his scheduled exceution date had passed, as did in fact occur here. This action could be part of a conscious strategem to delay the execution. Because we think that such action is relevant evidence as to whether or not there has been an abuse of the writ, we believe that the blind application of Fed.R.Civ.P. 41(a) to the dismissal of a prior application would be inconsistent with the legal principles above set out mandating that the problem of successive applications be governed by the abuse of the writ doctrine.[19] Accordingly, Potts' position in this regard is rejected.

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19. Although we think Potts' dismissal of his first petition is relevant in determining abuse with respect to the second petition, we conclude below that evidence with respect to any reason of justification for Potts' actions must also be considered. It is unthinkable that a single dismissal, which is allowed routinely to all civil litigants under Rule 41(a), could, by itself, and in the absence of proof of intent to litigate in piecemeal fashion or to vex, harass or delay, constitute an abuse with respect to a subsequent petition. In the instant case on remand, the fact of the dismissal of the first habeas petition will be relevant evidence on the abuse issue, along with evidence of any motivation or justification therefor, including any possible good faith belief that he had a one-time right to dismiss under Rule 41(a).

DOES A KNOWING AND INTENTIONAL WAIVER PER SE CONSTITUTE AN ABUSE OF THE WRIT OF HABEAS CORPUS?

[4] The district court held that Potts intentionally abandoned his federal corpus rights and that this rendered his subsequent petition an abuse of the writ. Despite Potts' allegations of reasons justifying his actions, and despite his proffer of evidence, the court did not hold an evidentiary hearing. The narrow and important issue facing us on this appeal is whether or not the knowing and intentional waiver, pursuant to the classic definition enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461, of Potts' federal habeas corpus rights renders a subsequent petition an abuse of the writ, without regard to any justifiable reasons Potts may have had for his initial waiver or subsequent petition.[20]

The district court relied on dicta from *Paprskar v. Estelle*, 612 F.2d 1003 (5th Cir. 1980), for the proposition that an abuse of the writ is present where there has been "'an intentional relinquishment or abandonment of a known right or privilege.'" *Paprskar*, 612 F.2d at 1006, quoting *Fay v. Noia*, 372 U.S. at 439, 83 S.Ct. at 849.

We believe the district court was lured into error by the citation out of context of the *Paprskar* and *Fay v. Noia* dicta. Full quotation of the pertinent portion of *Fay v.*

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20. For purposes of the discussion in this section, we assume *arguendo* that Potts' waiver was knowing and voluntary. Below we conclude that the district court's finding of voluntariness must be vacated and that on remand the issue of the waiver must be the subject of an evidentiary hearing.

Noia demonstrates that the Supreme Court saw the doctrine of abuse of the writ as an equitable principle:

> [W]e recognize a limited discretion in the federal judge to deny relief to an applicant under certain circumstances. Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, 'dispose of the matter as law and justice require,' 28 U.S.C. § 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 573, 73 S.Ct. 391, 397, 97 L.Ed. 549, 558 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. Narrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptionable. We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.
>
> But we wish to make very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The classic definition of waiver enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466, 146 A.L.R. 357—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. Cf. *Price v. Johnston*, 334 U.S. 266, 291, 68 S.Ct. 1049, 1063, 92 L.Ed. 1356, 1372.

372 U.S. at 438-39, 83 S.Ct. at 848-49. Taken in context, *Fay v. Noia* suggests that a waiver or abandonment must not only be intentional, as tested under *Johnson v. Zerbst*, but must also be under such circumstances "as to justify withholding federal habeas corpus relief." 372 U.S. at 399, 83 S.Ct. at 827. In other words, it must be tested under equitable principles. It must amount to "conduct . . . [such as] may disentitle him to the relief he seeks." The reason for petitioner's default or abandonment must be one that "whether for strategic, tactical, or any other reasons . . . can fairly be described as the deliberate bypassing of state procedures." The *Fay v. Noia* court faced the issue of whether a state prisoner's intentional failure to pursue his direct appeals in state court should bar his subsequent federal habeas corpus rights.[21] The flavor of the term "deliberate bypassing of state procedures" is revealed by the following quotation:

> We fully grant . . . that the exigencies of federalism warrant a limitation whereby the federal judge has

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21. The institutional concern in *Fay v. Noia* was one involving considerations of comity and the language concerning waiver dealt with abandonment of state means to vindicate federal claims. In the instant case the institutional concern is the avoidance of piecemeal litigation and the avoidance of successive applications whose purpose is to vex, harass or delay.

> the discretion to deny relief to one who has deliberately sought to subvert or evade the orderly adjudication of his federal defenses in the state courts.

372 U.S. at 433, 83 S.Ct. at 846.

Finally, the actual holding in *Fay v. Noia* demonstrates that the intentional abandonment of a right does not, by itself, constitute an abuse of the writ. The Supreme Court assumed that Noia knowingly chose to forego his right of direct appeal in state court; however, because this choice was made to avoid the risk of a death sentence—should Noia's conviction have been overturned on the state appeal and a retrial ordered—the Supreme Court held that: "Under no reasonable view can the state's version of Noia's reason for not appealing support an inference of deliberate bypassing of the state court system." 372 U.S. at 439, 83 S.Ct. at 849. Thus, in *Fay v. Noia* itself, there was an intelligent abandonment, but the Supreme Court held, in light of Noia's reasons for that choice, that his actions did not constitute a "deliberate circumvention of state procedures." 372 U.S. at 440, 83 S.Ct. at 849. "Noia's failure to appeal cannot under the circumstances be deemed an intelligent and understanding waiver of his right to appeal such as to justify the withholding of federal habeas corpus relief." 372 U.S. at 399, 83 S.Ct. at 827.

As mentioned above, the seminal case is *Sanders, supra,* which expressly formulated "rules to guide the lower federal courts" in dealing with "successive applications for federal habeas corpus and motions under Section 2255." 373 U.S. at 15, 83 S.Ct. at 1077. For clarity of understanding, we repeat the two categories into which *Sanders* divided its guidelines: first, cases in which a subsequent

habeas petition raised a ground which had been determined on the merits adversely to the applicant in a prior habeas petition; and second, cases in which a subsequent habeas petition raises a new ground, or the "same ground [that] was earlier presented but not adjudicated on the merits." 373 U.S. at 17, 83 S.Ct. at 1078.

The instant case is governed by the guidelines set out in *Sanders'* second category. The grounds of Potts' second habeas petition are substantively the same as those in his first habeas petition. However, Potts' first petition was never adjudicated on the merits. The state does not contend otherwise. *Sanders* explains clearly what a denial on the merits means:

> The prior denial must have rested on an adjudication of the merits of the ground presented in the subsequent application. *See Hobbs v. Pepersack,* 301 F.2d 875 (CA4th Cir. 1962). This means that if factual issues raised in the prior application, and it was not denied on the basis that the files and records conclusively resolved these issues, an evidentiary hearing was held. *See Motley v. United States,* 230 F.2d 110 (CA5th Cir. 1956); *Hallowell v. United States,* 197 F.2d 926 (CA5th Cir. 1952).

373 U.S. at 16, 83 S.Ct. at 1077. Potts' first petition did raise numerous factual issues; there was no evidentiary hearing and there was no determination on the basis of the files and records in the case; accordingly, there was no adjudication on the merits.

We turn, therefore, to the guidelines enunciated by *Sanders* for second category cases: "Full consideration of the merits of the new application can be avoided *only* if there has been an abuse of the writ." 373 U.S. at 17, 83 S.Ct. at 1078 (emphasis added). It is significant that

Sanders establishes abuse of the writ as the *only* theory justifying refusal to reach the merits of a "second category" habeas petition, such as Potts'. Therefore, unless an intentional waiver or abandonment of one's habeas rights also constitutes a *per se* abuse, it is clear that the district court erred in denying the writ on that basis alone.

Confirming our discussion of *Fay v. Noia, Sanders* clearly places the abuse doctrine in context as one "governed by equitable principles," i. e., "a suitor's conduct . . . may disentitle him to the relief he seeks." 373 U.S. at 17, 83 S.Ct. at 1078 (quoting from *Fay v. Noia,* 372 U.S. at 438, 83 S.Ct. at 848). The following phrases provide some hint of what the Supreme Court deemed to constitute an abuse: "Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." 373 U.S. at 18, 83 S.Ct. at 1078. Significantly, the *Sanders'* court expressly incorporates the principles developed in *Fay v. Noia,* 372 U.S. at 438-40, 83 S.Ct. at 848-849 (quoted in part above), and *Townsend v. Sain,* 372 U.S. at 317, 83 S.Ct. at 1078, as the "test governing whether a second or successive application may be deemed an abuse . . . of the writ." We have seen that *Fay v. Noia* placed the abuse doctrine in its context as an equitable principle. *Townsend v. Sain* referred to the *Fay v. Noia* standard as one of "inexcusable neglect." 372 U.S. at 317, 83 S.Ct. at 759. For the instant case, however, the most significant aspect of the *Fay v. Noia* elaboration of the tests governing the abuse doctrine is the holding itself that Noia's intentional abandonment of his direct state appeal right did not constitute an abuse because his actions were justified.

To support its conclusion that abandonment alone is sufficient to find abuse, the district court also relied upon the language of *Sanders* stating that if a prisoner deliberately abandons a ground, as did the petitioner in *Wong Doo v. United States,* 265 U.S. 239, 44 S.Ct. 524, 68 L.Ed. 999 (1924), an abuse might be found. We believe the district court misread this portion of *Sanders.* The cite to *Wong Doo* occurs in the paragraph discussing the need to look to the petitioners conduct and equitable principles in determining abuse. This is the paragraph that ends with the oft-cited standard that abuse is to be found if there is a purpose to litigate in piecemeal fashion or to vex, harass or delay. Earlier in the *Sanders* opinion, the Court characterized Wong Doo's action as being in bad faith. 373 U.S. at 10, 83 S.Ct. at 1074. Moreover, the actual opinion in *Wong Doo* demonstrates the Court's belief that Wong Doo's actions were in bad faith. The Supreme Court held that Wong Doo's failure to produce evidence at his first habeas hearing with respect to a ground alleged, and his reservation of that ground to support a subsequent habeas petition, demonstrated a lack of good faith and amounted to an abuse of the writ. The Supreme Court stated: "The petitioner had full opportunity to offer proof of [the ground] at the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abuse of the writ of habeas corpus. *No reason for not presenting the proof at the outset is offered.*" 265 U.S. at 241, 44 S.Ct. at 525 (emphasis added). This passage, read in its entirety, indicates the Supreme Court's conviction of the bad faith of the petitioner

in *Wong Doo.* Moreover, the last sentence in the above quotation is the factor which distinguishes the instant case. Here, Potts alleged reasons justifying his actions, requested a hearing thereon, and proffered evidence. The treatment of *Wong Doo, supra,* in subsequent Supreme Court cases emphasizes the significance of the last sentence in the above quotation, and makes clear that *Wong Doo* is consistent with the notion that the abuse doctrine is an equitable principle. See *Price v. Johnston,* 334 U.S. at 291, 68 S.Ct. at 1063; *Sanders,* 373 U.S. at 17-18, 83 S.Ct. at 1078-79.

This circuit recently announced, in a slightly different context, the very principles which we have deduced from *Sanders* and *Fay v. Noia.* In *Sosa v. United States,* 550 F.2d 244 (5th Cir. 1977), a federal prisoner intentionally and voluntarily dismissed his direct appeal from his conviction and sentence in district court. The issue we faced there was whether this "deliberate bypass" barred his subsequent § 2255 motion.[22] In holding that the § 2255 motion was not barred, we recognized that "the term 'deliberate

22. Although *Sosa* involved a § 2255 motion, this circuit has indicated that holdings respecting deliberate bypass in the context of federal habeas and § 2255 motions are equally applicable to one another. *McKnight v. United States,* 507 F.2d 1034 (5th Cir. 1975). Obviously the institutional concerns in *Sosa* are different from those we now face. There we addressed the institutional concern that § 2255 motions not be used as a substitute for a direct appeal, whereas in the instant case the institutional concern is avoidance of needless piecemeal litigation and the avoidance of collateral proceedings whose purpose is to vex, harass or delay. Although the nature of the institutional concern is different, the overriding principle in both kinds of cases is that habeas corpus is governed by equitable principles.

bypass' is not self-executing . . . it encapsulates an equitable doctrine." 550 F.2d at 247. We said:

> Our own jurisprudence traces a similar course, and consistently returns to the holding that the *motivation or reason for the failure to appeal,* and not the mere data that an appeal was not taken or completed, determines whether a section 2255 motion ought to be entertained.

550 F.2d at 247 (emphasis added). We also said:

> Our cases firmly reject any rigid application of the rule against surrogate appeals. Instead, they establish the principle that habeas will not be permitted to substitute for an appeal when the choice to seek habeas is made in order to seize some legal or tactical advantage for the defendant. No such ulterior purpose has been shown to have directed Sosa's actions.

550 F.2d at 248-49.[23]

23. Other cases in this circuit echo the statement in *Sosa. Montgomery v. Hopper,* 488 F.2d 877, 879 (5th Cir. 1973) ("Not even an outright failure to file an appeal would, of itself, constitute a deliberate bypass in the absence of clear proof that the decision not to appeal was made knowingly and understandingly *in order to secure some benefit to the petitioner.*" (emphasis added)); *McKnight v. United States,* 507 F.2d 1034, 1036 (5th Cir. 1975) ("[T]he emphasis is not merely on the fact that an appeal was not taken, but rather on why the appeal was not taken."); *Buckelew v. United States,* 575 F.2d 515, 519 (5th Cir. 1978) ("[P]roof of bypass typically involves a showing that the prisoner secured some tactical advantage by not pressing his claim earlier."); *see also Haley v. Estelle,* 632 F.2d 1273, 1275 (5th Cir. 1980) ("The principle behind Rule 9(b) is to dismiss those petitions that constitute 'needless' piecemeal litigation or whose 'purpose is to vex, harass, or delay.' "); and *Strickland v. Hopper,* 571 F.2d 275 (5th Cir. 1978), *cert. denied* 439 U.S. 842, 99 S.Ct. 135, 58 L.Ed.2d 141 (1978) (where this court affirmed

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Although none of the authorities discussed above involve the precise context of the instant case—an abandonment of all federal habeas corpus rights pursuant to the withdrawal of a first habeas petition—the guidelines provided by *Sanders* clearly control. The instant case, is encompassed within *Sanders'* second category, *i. e.*, presenting in a subsequent habeas petition the "same ground . . . earlier presented but not adjudicated on the merits." 373 U.S. at 17, 83 S.Ct. at 1078. Accordingly, we conclude that the equitable principles above discussed provide the standards governing the determination of abuse in this case. On the basis of the foregoing authority, we reverse the district court's legal conclusion that a knowing and intentional waiver necessarily renders any subsequent habeas petition an abuse of the writ, without regard to reasons which might be offered to justify the applicant's conduct. Our conclusion that the district court erred by not considering the reasons proffered by Potts to justify his actions is bolstered by our discussion in the next section

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the denial of a federal habeas corpus petition finding that the state prisoner had deliberately bypassed the orderly procedures of the state courts when he escaped and became a fugitive from justice, thus frustrating his state court motion for new trial. Although the court did not expressly speak in terms of equitable principles, the decision is clearly consistent therewith). *Cf. Wilwording v. Swenson*, 502 F.2d 844 (8th Cir. 1974), *cert. denied* 420 U.S. 912, 95 S.Ct. 835, 42 L.Ed.2d 843 (1975).

Although Potts arguably has achieved a tactical advantage, *i. e.*, the delay of his execution, there is evidence in the record he neither intended nor wanted this result. The evidentiary hearing on remand will afford an opportunity to inquire into this and other aspects of Potts' actions and test this conduct against the equitable principles comprising the abuse doctrine.

of the cases holding that a prisoner must be afforded an opportunity to explain an alleged abuse. We remand with instructions that the district court hold an evidentiary hearing to inquire into the reasons alleged by Potts to justify his actions, and to make findings of fact with respect thereto.

WHETHER A HEARING SHOULD HAVE BEEN HELD ON ISSUE OF ABUSE

[5] During the hearing on June 26, Potts' attorneys maintained that if the district court was prepared to reject his second petitions for being an abuse of the writ, they had a right to present evidence explaining Potts' action and rebutting the state's pleading of abuse. The district court permitted Potts' attorneys a brief offer of proof in which they quickly described various factors on which they were prepared to present evidence, some of which went to the voluntariness of Potts' withdrawal of his first petition. They also stated that Potts himself was prepared to explain his actions. The district court, however, refused to grant an evidentiary hearing on any issue relevant to abuse. On the basis of the evidence addressed in the "next friends" petition and in the June 10 hearing, the district judge was convinced that Potts had made an intentional and voluntary waiver of his right to federal habeas, and that this meant any subsequent petition was an abuse. We conclude that the court should have granted a hearing on the issue of abuse. Our holding in this matter is divided into two parts. In the first part, we discuss the law respecting the need for an evidentiary hearing with respect to the issue of abuse even assuming Potts' abandonment was indeed knowing and voluntary.

In the second part, we discuss the need for an evidentiary hearing to determine the voluntariness of Potts' abandonment. By separating the issues to be determined in an evidentiary hearing into these two contexts, we hope to clarify the district court's task on remand.

(i) Hearing on issue of abuse.

[6] Even if Potts' waiver and abandonment were as a matter of fact knowing and voluntary, an evidentiary hearing in this case is nevertheless necessary to determine whether an abuse of the writ has occurred. This holding follows from our holding above that an intentional abandonment does not, by itself, constitute an abuse, and from the cases discussed below holding that a petitioner must have an opportunity to rebut and explain any allegation of abuse. Such a procedure is consistent with the concern for the equities of a prisoner's action when abuse is alleged.

Prior law indicates that a petitioner's right to rebut or explain any alleged abuse is broad and does not depend upon the type of abuse alleged. *Price v. Johnston,* 334 U.S. 266, 292, 68 S.Ct. 1049, 1063, 92 L.Ed. 1356, 1373 (1948), establishes that the government has the burden of first pleading abuse of the writ, a burden met here. *See also Sanders v. United States, supra.* It further establishes that once the government has met its burden by pleading abuse of the writ, the petitioner must be afforded an opportunity to present evidence rebutting the government's pleading:

> Once a particular abuse has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ. If the answer is inadequate, the court may dismiss the petition without further proceedings. But if there is a substantial conflict, a hearing may be necessary to determine the actual facts. Appropriate findings and conclusions of law can then be made. In this way an adequate record may be established so that appellate courts can determine the precise basis of the district court's action, which is often shrouded in ambiguity where a petition is dismissed without an expressed reason. And the prisoner is given a fairer opportunity to meet all possible objections to the filing of his petition.

Price v. Johnston, 334 U.S. at 292-93, 68 S.Ct. at 1063-64. We agree with the Fourth Circuit in *Johnson v. Copinger,* 420 F.2d 395 (4th Cir. 1969), which held that the the obligation placed upon a petitioner to demonstrate that his action is excusable and does not amount to an abuse of the writ, carries a concomitant obligation on the part of the court to afford a petitioner an opportunity to make his explanation, if he has one. 420 F.2d at 399. *Fay v. Noia,* relying on *Price v. Johnston,* indicated that a federal court may find a deliberate bypass of state procedures only if the federal court is satisfied by a hearing or some other means of the facts surrounding the applicant's default. 372 U.S. at 439, 83 S.Ct. at 849. *See also Sanders v. United States,* 373 U.S. at 20-21, 83 S.Ct. at 1079-80, remanding for a hearing on the abuse issue raised there. Moreover, the *Advisory Committee Note* with respect to Rule 9(b) indicated that it is expected that a petitioner would have an opportunity to explain any alleged abuse, citing *Johnson v. Copinger, supra.*[24] To aid in this en-

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24. The Fourth Circuit in *Johnson v. Copinger,* where a different ground for abuse was alleged, also stated:

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deavor, the drafters of the Rules appended to the Rules a recommended form by which a court could inform a petitioner his application was in danger of being dismissed as an abuse, thus affording him an opportunity to present mitigating facts.[25]

This circuit has not been insensitive to the requirement that a federal habeas or § 2255 petitioner must have an opportunity to rebut an allegation of abuse. Where there is alleged a waiver of a constitutional right because of a deliberate bypass, the most frequently claimed form of abuse, this circuit has many times remanded cases to district courts for an evidentiary hearing on the issue of a bypass.[26] Indeed, with respect to whether there has been

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> Therefore, we hold that in a case in which the district judge believes, after examining the petition for habeas corpus, that the petitioner may have in an earlier petition deliberately withheld grounds then available to him, the judge may not dismiss the petition on the ground of abuse of the writ without first giving notice to the petitioner that such action is contemplated and affording him an opportunity to amend his petition to offer any explanation he may have which would justify his earlier omission or show that the omission was not deliberate, or that the grounds were not then known to him.

420 F.2d at 399.

25. The forms appended by Rules for Governing Section 2254 Cases have not been used in any of Potts' petitions. Instead, his petitions apparently have been prepared by attorneys, using the *pro se* petition form with a space at the end for his signature.

26. *McKnight v. United States*, 507 F.2d 1034 (5th Cir. 1975); *Bailey v. State of Alabama*, 505 F.2d 1024 (5th Cir. 1975); *Morris v. United States*, 503 F.2d 457 (5th Cir. 1974); *Montgomery v. Hopper*, 488 F.2d 877 (5th Cir. 1973); *Collier v. Estelle*, 488 F.2d 929 (5th Cir. 1974); *Montgomery v. United*

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a waiver by deliberate bypass, this circuit has stated that the standards for finding such a waiver are rigid. *Buckelew v. United States*, 575 F.2d 515, 519 (5th Cir. 1978); *Montgomery v. Hopper*, 488 F.2d 877 (5th Cir. 1973).

An exception we have found to this opportunity to rebut an alleged abuse is the rule derived in § 2255 cases that an evidentiary hearing on a deliberate bypass issue need not be held when the record has sufficient evidentiary development to clearly show a deliberate bypass. *Coco v. United States*, 569 F.2d 367 (5th Cir. 1978); *Buckelew v. United States*, 575 F.2d 215 (5th Cir. 1978) (dictum). We have applied the same rule in the context of a deliberate bypass of state procedure where the record clearly indicates a deliberate bypass. *Johnston v. Estelle*, 548 F.2d 1238 (5th Cir.), *cert. denied* 434 U.S. 850, 98 S.Ct. 161, 54 L.Ed.2d 118 (1977).

We conclude that the record in the instant case does not clearly show an abuse, and accordingly, we hold that the district court erred in failing to hold an evidentiary

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States, 469 F.2d 148 (5th Cir. 1972); *Montgomery v. Caldwell*, 457 F.2d 767 (5th Cir. 1972); *Johnson v. Smith*, 449 F.2d 127 (5th Cir. 1971); *Bonaparte v. Smith*, 448 F.2d 385 (5th Cir. 1971). Other circuits also have remanded cases for evidentiary hearings concerning waiver by deliberate bypass. *United States v. Barnes*, 610 F.2d 888 (D.C. Cir. 1980); *Zarola v. Crowen*, 433 F.2d 335 (9th Cir. 1970). *See also Haley v. Estelle*, 632 F.2d 1273, 1276 (5th Cir., 1980) ("Where substantial conflict exists, it may be necessary to hold a hearing to determine the actual facts.")

hearing.[27] Potts has alleged reasons to justify his actions, has requested a hearing, and has even made an abbreviated proffer of evidence. For example, at the June 10 hearing, before the issue of abuse was even raised, Potts gave a reason for withdrawing his first habeas petition, which the district court on remand may well find to be plausible, and which would be evidence of an absence of abuse. He stated that he filed the first habeas petition to comfort his brother, and in the belief that no stay would be granted. This explanation is consistent with Potts' refusal to pursue any attack on his conviction from late 1979, until June 4, 1980, and reflects what the district court on remand may well find to be a natural familial concern considering the emotional circumstances in which Potts found himself. Indeed, the district court gave as one reason for finding Potts competent to dismiss his first petition his explanation that he filed the petition solely to comfort his brother. We do not believe that the chronology of the events—the fact that the first petition was filed on the day before the scheduled June 5 execution date and the fact that the second petition was filed on June 25, six days before the July 1 execution date—clearly shows an abuse in this case where the above-mentioned and other explanations have been proffered to justify Potts' actions, and especially when the emotionally charged atmosphere surrounding Potts is considered. Nothing in the record clearly shows that the al-

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27. Of significance in this regard is the fact that Potts was in the courtroom on June 26, unlike most prisoners who cannot be brought to court without inconvenience. Because of the seriousness of Potts' sentence and because of the slight inconvenience to have Potts explain his actions at the June 26 hearing, the duty to give a prisoner the opportunity to rebut an allegation of abuse becomes even more stringent.

leged justifications are implausible on their face. We conclude, therefore, that the district court should on remand afford Potts an opportunity to rebut the state's allegation of abuse, that the district court should hold an evidentiary hearing to inquire into the explanations offered by Potts to justify his actions and to hear any evidence in opposition which the state might offer, and that the district court should, applying the equitable principles set forth in this opinion make findings of fact and conclusions of law as to whether or not Potts has abused the writ of habeas corpus.

(ii) Hearing on issue of voluntariness

For the sake of the preceding arguments we have assumed that Potts' abandonment of federal habeas rights was knowing and voluntary. Before the district court in his second petition and before this court, Potts has maintained that his abandonment was not voluntary because of, *inter alia*, harassment from prison authorities, inadequate medical care and constant pain from bullet wound, discontent of family members at the prospect of Potts' continued incarceration, and the "circus atmosphere" surrounding his case. Although Potts' attorneys requested an evidentiary hearing on these factual allegations relevant to voluntariness, and made an offer of proof of evidence they were then prepared to present on the issue of voluntariness, the district court refused to grant a hearing on this issue. The district court, in its order of June 26, held that on the basis of the evidence in the "next friends" petitions and in the June 10 hearing, there could be no question but that Potts had made an intentional, knowing and voluntary waiver of his right to federal habeas. In relying on evidence in the "next friends" petition and in refusing to

grant Potts an evidentiary hearing on the issue of voluntariness, the court erred.

In his brief, Potts, without citation of authority, argues that the district court's reliance on facts adduced at the "next friends" proceeding, which Potts had not authorized and at which he had neither been present nor represented by counsel, was improper. The state, also without citation of authority, relies upon the fact that the district court heard evidence respecting Potts' competence at the "next friends" hearing to bolster the district court's finding of a voluntary abandonment. The court's June 26 order does not indicate to what extent the district court relied on evidence presented in the "next friends" hearing, but does clearly indicate that such evidence was considered in finding Potts' actions on June 10 to be voluntary. We are not told whether the court looked to the testimony of the psychologist, the documentary evidence, or the videotape of Potts which was introduced in the "next friends" hearing.[28] Nor are we told the content of this evidence. Potts was not a party to the "next friends" petition, and the state has made no claims that Potts is collaterally estopped from contesting any issue decided in the "next

28. During the June 10 hearing, the district court asked Potts whether the views he was expressing on June 10 were the same as those in the videotape of his June 2 news conference. Potts gave an ambiguous answer to this question. (Tr., June 10, 1980, hearing, p. 11). Accordingly, we are unable to determine whether Potts adopted the views expressed in the videotape as his own. Regardless of this ambiguity, the fact remains that we do not know whether the district court relied on the documentary evidence and psychologist's testimony in the "next friends" hearing as well.

friends" proceedings or that judicial notice[29] of such evidence was appropriate.[30] Nor did the district court offer any justification for its reliance on evidence presented in a suit to which Potts was not a party. We conclude the court erred in relying on evidence presented in the "next friends" hearing and that such error requires a remand.

Moreover, the district court should have granted a hearing on the issue of the voluntariness of Potts' abandonment, because Potts on June 26 made extensive factual allegations which were not contradicted by his testimony in the June 10 hearing and which raised issues outside the record and not resolvable through the personal knowledge of the district court judge. Among these allegations were Potts' assertion of harassment from prison authorities, pressure from some family members to dismiss his habeas petitions, constant pain resulting from a bullet wound and inadequate medical care of the wound, and a "circus atmosphere" surrounding his case. Our holding on this point is grounded in *Sanders* as well as cases dealing with the analogous situation where a federal prisoner subsequently attacks his guilty plea in a § 2255 motion before the same judge who accepted the guilty plea after duly complying with Fed.R.Crim.P. 11.

29. "Judicial" notice is generally defined as a judge's utilization of knowledge other than that derived from formal evidenitary proof in the pending case." 1 Weinstein, *Evidence*, ¶ 200 [01] (1979).

30. We do not suggest that either collateral estoppel or judicial notice would be appropriate. On the contrary, we would anticipate serious problems with either theory in the context of this case. However, since neither theory is asserted by the state, we express no opinion thereon.

In *Sanders*, the petitioner attacked his waiver of indictment and guilty plea before the same judge who accepted the waiver and plea on grounds that he was mentally incompetent because of narcotics administered to him before his appearance before the court. The petitioner submitted an affidavit in support of his allegation of incompetency. The Supreme Court held that the petitioner was entitled to a hearing since he alleged matters outside the record. Although the Court acknowledged that the petitioner's actions before the district court in waiving indictment may have appeared in all respects normal, the record there still did not conclusively show his allegation to be groundless. The Court also found corroboration of the petitioner's claim in the fact that petitioner asked for treatment as an addict during his waiver of indictment.

[7] There is further support for our conclusion in the analogous situation where a federal prisoner attempts to attack a guilty plea in a § 2255 motion filed with the same judge who took the guilty plea after following the procedure of Fed.R.Crim.P. 11. Frequently, federal prisoners who swore their plea was voluntary and testified as to fact surrounding that plea, will later attack the plea as being involuntary and attempt to recant the testimony given at the Rule 11 proceeding. The parallels to the instant case are obvious.[31] In the context of a § 2255 motion

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31. While the cases in which a § 2255 petitioner attacks a guilty plea have not involved the problem of abuse of the writ, we are impressed by the fact that a hearing is nevertheless often required in this context where a trial judge has first-hand and extensive knowledge of the facts. In the context of a question of abuse of the writ, where concerns of finality are not so strong, there very well may be more reason to give the petitioner a hearing to attack the voluntariness of any act relevant to the abuse question.

attacking a guilty plea, we have held that ordinarily a defendant will not be heard to refute testimony given under oath when pleading guilty. *United States v. Sanderson*, 595 F.2d 1021 (5th Cir. 1979). Nevertheless, in this circuit, as well as in the Supreme Court, when a § 2255 petitioner sets out detailed factual allegations regarding alleged circumstances which may go to the voluntariness of his plea, the petitioner is entitled to a hearing unless the motion and the files on record conclusively show the petitioner is entitled to no relief. *Fontaine v. United States*, 411 U.S. 213, 93 S.Ct. 1461, 36 L.Ed.2d 169 (1973); *Machibroda v. United States*, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962); *United States v. McCord*, 618 F.2d 389 (5th Cir. 1980); *United States v. Sanderson*, 595 F.2d 1021 (5th Cir. 1979); *Dugan v. United States*, 521 F.2d 231 (5th Cir. 1976); *cf. McKenzie v. Wainwright*, 632 F.2d 649 (5th Cir., 1980) and *Bryan v. United States*, 492 F.2d 775 (5th Cir.), *cert. denied* 419 U.S. 1079, 95 S.Ct. 668, 42 L.Ed.2d 674 (1974). Typically, this circuit has found some form of corroboration to a petitioner's allegations before requiring a hearing. *United States v. McCord, supra; United States v. Sanderson, supra; Dugan v. United States, supra.*

As in both *Sanders* and the analogous cases involving attacks on guilty pleas, Potts has alleged matters which cannot be concluded from the record. Although Potts at one point in the June 10 hearing denied coercion as a factor in his dismissal of his first petitions, he is now alleging harassment by prison authorities, a matter upon which the record is silent. The record does not show what family pressures may have affected Potts, other than his allegation in his brief that his mother told him he was

wrong in pursuing an appeal. Nor have we any indication of the medical treatment he has received while in prison or the treatment he could expect should his death penalties be overturned. Nothing Potts said in the June 10 hearing addressed these allegations, and an evidentiary hearing will be necessary if they are to be substantiated or refuted.

We also believe that there is some corroboration of Potts' allegations of harassment from prison authorities in his June 10 hearing.[32] When asked specifically whether he was abandoning his claims because of certain actions by prison authorities, Potts acknowledged that "some things did happen" and he requested the court's help to make sure they would not happen again, but insisted that he was dismissing his petitions because they had been filed only to console his brother. (Tr., June 10, 1980, pp. 35-36).

Because the district court erroneously relied on evidence adduced in a case to which Potts was not a party, and because Potts has alleged facts—relevant to the issue of voluntariness and raising issues outside the record and not resolvable through the personal knowledge of the district judge—which require an evidentiary hearing.[33] we

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32. While not providing clear corroboration of Potts' allegation of family discontent over his decision to file his first petition, the fact that Potts wrote his June 6 letter dismissing his first petition in the presence of his mother and has had frequent contact with his mother (Tr., June 10, 1980, hearing, p. 26), and wished to consult with family members before filing his second petition, provides some credibility to his allegation of family pressure.

33. As we noted above in note 27, Potts and other witnesses were present in the courtroom on June 26 and were pre-

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remand to the district court for an evidentiary hearing on whether Potts' abandonment of his federal habeas corpus rights was voluntary.[34]

ENDS OF JUSTICE

[8] Although we have focused our attention on the proper considerations for a determination of an abuse of the writ, we are cognizant of the requirement in *Sanders* that even if a successive petition could otherwise be dismissed without consideration on the merits, the ends of justice may nevertheless induce—and may even require—the district judge to exercise his discretion to address the merits. *Sanders v. United States*, 373 U.S. at 18-19, 83 S.Ct. at 1078-79. There are weighty factors in the instant case, in addition to those we have considered with respect to abuse, which are relevant as to whether the ends of justice would be served by addressing Potts' second petition. The fact that a man's life is at stake is relevant. Also relevant is the fact that Potts would be executed without ever having had any federal review of the merits of the

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pared to testify concerning the voluntariness of Potts' abandonment. Because of the seriousness of the sentence Potts was attacking and because it would have inconvenienced the district court only slightly to take evidence on this issue during the June 26 hearing, there was much less reason for the court in this case to rely solely on Potts' sworn testimony of June 10.

34. Although it may be the case that the evidence developed at the evidentiary hearing is insufficient to demonstrate an involuntary abandonment, the same evidence nevertheless may be relevant on the issue of abuse and whether some reason justifying Potts' action exists.

alleged constitutional defects in his conviction and sentence. The district judge may weigh these consequences against the degree of fault or misconduct which he might find on remand. Also relevant is any possible prejudice to the state, *e. g.*, whether the state has lost important transcripts or witnesses necessary to rebut Potts' substantive claims. We express no opinion with respect to whether the ends of justice require the district court to address Potts' second petitions, preferring that the district court on remand address the question in the first instance, if necessary.

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CONCLUSION

We conclude that a remand for an evidentiary hearing is necessary with respect to Potts' second set of petitions, numbered 80-7476 and 80-7477 in this court. Although we reject Potts' argument based on Fed.R.Civ.P. 41(a), we agree that Potts' intentional abandonment does not, by itself, constitute an abuse of the writ of habeas corpus. Rather, Potts' actions must be tested against the equitable principles which we have deduced from prior cases, primarily *Sanders v. United States, supra,* and *Fay v. Noia, supra.* The district court on remand shall hold an evidentiary hearing on the abuse issue generally and on the sub-issue involving voluntariness, shall make findings of fact and conclusions of law—applying the applicable equitable principles to the totality of the facts and circumstances. Finally, the district court shall, if necessary, address the ends of justice issue.

With respect to the appeal of his first two petitions, numbered 80-7664 and 80-7665 in this court, Potts applied

to this court for a certificate of probable cause only as a precautionary measure should the dismissal of the first petitions be deemed anything other than a voluntary dismissal under Fed.R.Civ.P. 41(a). No briefs have been filed with respect to those appeals, but instead Potts' attorneys evidently informed the clerk of this court of their intention to file a motion to adopt the briefs in numbers 80-7476 and 80-7477, and of the likelihood of their filing supplemental briefs. No such supplemental briefs have been filed. Considering the briefs in 80-7476 and 80-7477, appealing the dismissal of the second petition, the only possible assertion of error in 80-7664 and 80-7665 relates to the issue of whether Potts' abandonment of his first petition was voluntary. We note that this issue will be determined when the district court considers the second petition on remand. If Potts is successful, he will have a determination on the merits of all the claims raised in the first petition. Therefore, this issue provides no need to prolong the life of the first petition. We note also that Potts expressly does not argue, either in brief or at oral argument, that he was incompetent at the time he dismissed his first petition, and thus incapable of abandoning it. Seeing no error, we affirm the district court's dismissal of the petitions in 80-7664 and 80-7665.

With respect to docket numbers 80-7664 and 80-7665, AFFIRMED.

With respect to docket numbers 80-7476 and 80-7477, VACATED AND REMANDED.

THOMAS A. CLARK, Circuit Judge, specially concurring:

I concur.

I agree with and concur in Judge Anderson's scholarly and thoughtful opinion. I think that the remand provided for in his opinion is the least that is required under the circumstances; I would go further and require a hearing on the merits because I believe the facts and the ends of justice overwhelmingly compel the granting of a habeas corpus hearing on the merits. I would therefore hold that it is unnecessary to conduct a hearing in order to determine whether a later hearing on the merits of Potts' constitutional claims should be had.

We are balancing (1) the right of a prisoner to a habeas corpus hearing one month after he waived such a right, against (2) the possibility that the state might have suffered substantial prejudice if the hearing were granted, and (3) the district court's being vexed or harassed in the performance of its functions or the prisoner's obtaining a delay of his death sentence.

Judge Anderson has forcefully elucidated the preeminence of habeas corpus in our country's criminal law procedure. Here the prisoner is sentenced to die; he has not had a federal habeas corpus hearing; the record clearly reflects a tortured and vacillating mental state that has bent to differing pressures from his brother, his mother, his attorneys, and the news media, not to consider the alleged maltreatment in prison about which no evidence has been taken in the instant case. One cannot truly be surprised that the prisoner at one time wanted to hurry his own execution and at another time wanted to live and seek relief for claimed deprivation of constitutional rights.

I read the holding in *Sanders* to require an express finding that Potts had the specific intent to vex, harass, or

delay in withdrawing the first petition before he could be denied a hearing on the second petition. I see no evidence of such intent in the record that has been made up to this time.

Alternatively, I can only conclude that the ends of justice demand a hearing on the second petition. Assuming no prejudice to the state, we have on the one hand the possibility to vex, harass, and delay—on the other, death by electrocution without determining if the prisoner was deprived of his rights. The ends of justice require that the district court fully consider the prisoner's constitutional claims under these extreme circumstances. To do otherwise would always leave unanswered the questions—Did Potts intend to vex, harass, and delay? Was Potts deprived of any of his federal constitutional rights? Was it appropriate to take his life by answering the first question yes and avoiding an answer to the latter question? The price of granting a full hearing is too small when balancing these considerations.

LEWIS R. MORGAN, Circuit Judge, dissenting.

I dissent from the majority opinion vacating the district court's order dismissing the appellant's petitions. I would affirm the order of the district court. The court below found there was an intentional, knowing and unequivocal relinquishment of a known right which constituted a waiver of federal habeas corpus review. Under the evidence, that there was a waiver and an abandonment is established beyond any doubt. Seeking another stay and consideration of substantively identical successive petitions constitutes an abuse of the writ as defined by *Sanders v. United States,* 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148. I

agree with the district court order that there must be an end to litigation and that such frustration of the legal processes should not be allowed to continue.

OPPOSITION BRIEF

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85 - 337

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Petitioner,

v.

JACK HOWARD POTTS,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I.

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY DETERMINED THAT THE DISTRICT COURT BELOW COULD RESOLVE THE ABUSE OF THE WRIT ISSUE ON SUMMARY JUDGMENT.

II.

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DID NOT RELY UPON SUPERVISORY POWERS IN DETERMINING THE UNCONSTITUTIONALITY OF THE CLOSING ARGUMENT, AS CONTENDED BY THE PETITIONER-WARDEN.

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No. 85-337

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF THE CASE[1]

(1) Procedural History

On March 11, 1976, Respondent, Jack Howard Potts (Jackie Potts) was convicted in the Superior Court of Cobb County, Georgia of kidnapping, two counts of armed robbery and one count of aggravated assault. Jackie Potts received death sentences for kidnapping and one count of armed robbery, a life

1. This case is a consolidated appeal from the judgments of the United States District Court for the Northern District of Georgia, Atlanta (C80-1078A) and Gainesville (C80-50G) Divisions. References to the consolidated Record on appeal will be designated "R" followed by the appropriate volume and page number. References to Jackie Potts' trial in the Superior Court of Cobb County will be designated "Tr. Cobb Co." followed by the appropriate page number. References to Jackie Potts' trial in the Superior Court of Forsyth County will be designated "Tr. Forsyth Co." followed by the appropriate page number.

sentence for the second count of armed robbery and a ten year sentence for aggravated assault.

Jackie Potts was subsequently tried and convicted for murder in the Superior Court of Forsyth County, Georgia and again received a death sentence.

Since they involved the same factual situation, the Cobb and Forsyth County cases were consolidated on appeal by the Supreme Court of Georgia which affirmed all convictions and sentences, except the death sentence for armed robbery was vacated. Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978).

Following state post-conviction proceedings, Jackie Potts filed petitions for writ of habeas corpus in the United States District Court for the Northern District of Georgia, Atlanta and Gainesville Divisions. These petitions were dismissed by Respondent. Subsequently, on June 24, 1980, Respondent filed petitions for writ of habeas corpus in the United States District Court for the Northern District of Georgia, Atlanta and Gainesville Divisions, challenging his Cobb and Forsyth Counties' convictions and sentences. These petitions were dismissed by the District Court on June 26, 1980 (R. Vol. 1, p. 58).

The judgment of the District Court was reversed in Potts v. Zant, 638 F.2d 727 (5th Cir. 1981).

On remand, the District Court below granted habeas corpus relief as to Jackie Potts' Cobb County conviction for kidnapping and sentence of death and his Forsyth County sentence of death (R. Vol. 7, p. 500).

The State filed a notice of appeal (R. Vol. 7, p. 534); Respondent filed a notice of cross-appeal (R. Vol. 7, p. 538). Probable cause to cross-appeal was granted by the District Court. (R. Vol. 7, p. 539).

The United States Court of Appeals for the Eleventh Circuit affirmed the district court on May 29, 1984, Potts v. Zant, 734

F.2d 526 (11th Cir. 1984). That court denied the State's suggestion for rehearing en banc on June 21, 1985.

The State filed a petition for writ of certiorari on August 27, 1985 (No. 85-337).

(ii) Statement of Facts

The facts relevant to each issue will be incorporated into the argument of that issue.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I.

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY DETERMINED THAT THE DISTRICT COURT BELOW COULD RESOLVE THE ABUSE OF THE WRIT ISSUE ON SUMMARY JUDGMENT.

The Petitioner-Warden contends that the Court of Appeals placed the burden of proving abuse of the writ upon the State by deciding this issue on summary judgment.

There was no "substantial conflict" in the actual facts involved and Judge Vance, writing for the panel, clearly and correctly held:

> The state contends that this court's decision in Potts I mandated the holding of an evidentiary hearing and that it was error for the district court to refuse to do so. It is clear from this court's decision in Potts I and leading precedents such as Price v. Johnston, 334 U.S. 266, 68 S.Ct. 1049, 92 L.E.d 1356 (1948), however, that a hearing on the issue of abuse of the writ is necessary only when there is 'a substantial conflict' as to the actual facts involved. Price v. Johnston, 334 U.S. at 292, 68 S.Ct. at 1063. The district court in this case found that there were no disputed issues of material fact with regard to Potts' reasons for authorizing and subsequently withdrawing his first set of petitions, and held as a matter of law that the facts established in Potts' affidavit and the record of the two previous hearings failed to support the state's claim of bad faith. We see no reason to disturb this holding on appeal, particularly since this court emphasized in Potts I that the

> ends of justice might require the district court to consider the merits of petitioner's complaint even if there did appear to be a colorable basis for the state's claim of abuse.
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> 734 F.2d at 529.

II.

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY HELD THE TRIAL COURT DEPRIVED RESPONDENT OF DUE PROCESS OF LAW BY NOT CHARGING THE JURY AS TO THE ESSENTIAL ELEMENT OF THE CRIME FOR WHICH RESPONDENT WAS GIVEN A DEATH SENTENCE.

The Cobb County Grand Jury indictment charged Jackie Potts with kidnapping with bodily injury. The sole bodily injury relied upon for this indictment was the killing of Michael Priest. Tr. Cobb Co. 132, 614-615.

At the guilt/innocence phase of the Cobb County trial the court instructed the jury only as to the elements of kidnapping; the element of bodily injury necessary to sustain the indictment was omitted from the instructions:

> Members of the jury, Count Three of this indictment charges kidnapping, and at this time I instruct you a person commits kidnapping when he abducts or steals away any person without legal authority or warrant and holds such person against his or her will.
>
> Tr. Cobb Co. 624.

The jury made no specific finding of bodily injury and returned a guilty verdict only as to "kidnapping". Tr. Cobb Co. 637.

At the penalty phase of the trial the court again omitted any reference in the instructions to the "bodily injury" which is an essential element of the crime for which Mr. Potts was given a death sentence. Tr. Cobb Co. 647-648.

Although presented with the opportunity to find the murder of Priest as a statutory aggravating circumstance in determining the sentence, the jury specifically refused to find that Potts had murdered Priest. Tr. Cobb Co. 652-653. The jury failed to

find specifically that any bodily injury had occurred or to find, as a statutory aggravating circumstance, that:

> (1) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhumane in that it involved torture, depravity of mind, or an aggravated battery to the victim.
> Tr. Cobb Co. 645-46, 652.

The only aggravating circumstance found by the jury was that the offense was committed while the offender was engaged in the commission of another capital felony: armed robbery.

The Georgia kidnapping statute under which Mr. Potts was convicted creates three categories of the offense of kidnapping by adding elements and corresponding punishments to the basic definition of the crime.[2]

> For any particular act or conduct to constitute a criminal offense the statute defining the offense, or some other law of the State must in express terms declare such conduct to be a violation of the law or provide that it be punished as a criminal offense. In the latter event, the conduct in question is by necessary implication designated a crime. Krist v. State, 227 Ga. 85, 89; 179 S.E.2d 56 (1970), quoting Wood v. State, 219 Ga. 509, 511, 134 S.E.2d 8 (1963) [emphasis in original].

2. In pertinent part, the Georgia statute provides: §26-1311; OCGA §16-5-40:

> (a) A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds (him) against his will . . .
> (b) A person convicted of kidnapping shall be punished by imprisonment for not less than one nor more than 20 years . . . Provided . . . that if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death.

A third offense under the Georgia kidnapping statute, kidnapping for ransom, is defined as follows:

> (b) A person convicted of kidnapping shall be punished by imprisonment for not less than one year or more than 20 years: Provided that a person convicted of kidnapping for ransom shall be punished by life imprisonment or by death . . .

Kidnapping and kidnapping with bodily injury are two distinct offenses under Georgia law, for which guilty findings must be specifically found in order to sustain conviction and sentence.[3]

Georgia law clearly provides that a conviction of kidnapping cannot sustain a death sentence. The Georgia Supreme Court most recently explained the difference between the capital offense of kidnapping with bodily injury and the non-capital offense of kidnapping in Patrick v. State, 247 Ga. 168; 274 S.E.2d 570 (1981):

> Simple kidnapping is not a capital felony; kidnapping for ransom or kidnapping with bodily injury is. Code Ann. §26-1311. The court here charged only 'kidnapping' and the jury found only 'kidnapping'. Since simple kidnapping is not a capital felony as contemplated by Code Ann. §27-2534.1(b)(2) the jury's finding of 'kidnapping' in this case cannot support the death penalty.

The phrase "simple kidnapping" was coined by the Georgia Supreme Court in Allen v. State, 233 Ga. 200, 210 S.E.2d 680 (1974), to designate convictions of kidnapping not involving findings of bodily injury or ransom and limited in punishment to twenty year prison terms. "Simple kidnapping" is the same offense referred to as "kidnapping" in the Georgia statute.

The Georgia courts have continued to define simple kidnapping as a lesser, distinct offense. See, e.g., Smith v. State, 236 Ga. 5 ; 222 S.E.2d. 354 (1976); Patrick v. State, supra; Weaver v. State, 137 Ga. App. 470; 224 S.E.2d 110 (1976).

Under Georgia law, a conviction of kidnapping with bodily injury may be upheld when the court specifically instructs as to, and the jury finds the defendant guilty of, kidnapping with bodily injury. Smith v. State, supra. Potts' jury in Cobb

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3. Ga. Code Ann. §26-1311, OCGA §16-5-40; Patrick v. State, 247 Ga. 168, 274 S.E. 2d 570 (1981); Crawford v. State, 254 Ga. ___, 330 S.E.2d 567 (1985).

County was never instructed as to kidnapping with bodily injury, and found Potts guilty of only kidnapping.

The Circuit Court of Appeals properly held the inadequacy of the trial judge's instructions at both the guilt/innocence and sentencing trials in Cobb County deprived the Respondent of due process of law.

II.

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DID NOT RELY UPON SUPERVISORY POWERS IN DETERMINING THE UNCONSTITUTIONALITY OF THE CLOSING ARGUMENT, AS CONTENDED BY THE PETITIONER-WARDEN.

Judge Vance, writing for the panel, definitively and emphatically disposed of the Warden's contention:

> Initially, we note that in reviewing a habeas corpus petitioner's claim of prosecutorial misconduct in the context of a jury argument, our standard of review is the narrow one of due process, rather than the broad exercise of supervisory power that federal appellate tribunals possess with regard to their own trial courts. Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974).

734 F.2d at 535.

In his special concurrence on this issue, Judge Hill further identifies the unconstitutional aspects of the prosecution's conduct:

> As presented by the prosecutor, it appeared that the Supreme Court of the state had ruled that 'sickly sentimentality,' a 'tender heart,' 'false humanity,' 'mercy,' and consideration of the criminal defendant had been declared unlawful in Georgia and that a juror who entertained such feelings would be a lawbreaker.
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> • • • • • •
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> . . . [T]he quotation was not of an individual; it was of the Supreme Court of the state. It was not put forth as a person's view: it was proffered as the law. I believe it not to have been the law when written in 1873. At all events, it was not the law at the time of this trial.

CONCLUSION

Respondent, Jackie Potts, for the reasons stated above, prays that the Warden's petition for writ of certiorari be denied.

Respectfully submitted,

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OPINION

SUPREME COURT OF THE UNITED STATES

RALPH KEMP, WARDEN *v.* JACK HOWARD POTTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-337. Decided March 10, 1986

The motion of respondent for leave to proceed *in forma pauperis* is granted.

The petition for writ of certiorari is denied.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting from the denial of certiorari.

Eleven years ago, while in Cobb County, Georgia, Potts and a female companion persuaded Robert Snyder to give them a ride in a pickup truck. After Snyder agreed, Potts shot him through the left ear and nose with a pistol. Snyder acted as if he were unconscious while Potts dragged him out of the truck. Potts robbed Snyder and then, unable to start the truck, walked to a nearby home. There he told Michael Priest that an accident had occurred. Priest drove Potts back to the truck. Upon their arrival, Priest saw Snyder lying in a ditch and attempted to help him. But Potts ordered Priest to drive him and his companion to the next county, Forsyth County. Once there, he forced Priest out of the car at gunpoint. Priest said, "Oh my God, don't kill me"; Potts retorted that there was no such thing as God, and that he would determine whether Priest would live or die. Potts then put a gun to Priest's head and killed him.

Potts was convicted in the Superior Court of Cobb County of kidnapping Priest with bodily injury, armed robbery of Priest, and armed robbery and aggravated assault of Snyder. Potts was sentenced to death for the kidnapping and for the armed robbery. He was subsequently tried in the Superior Court of Forsyth County for the murder of Priest and

received another death sentence. Potts' convictions and sentences were affirmed by the Georgia Supreme Court, although the court vacated Potts' death sentence for armed robbery. He then sought and was denied state habeas relief.

Potts next sought a writ of habeas corpus in United States District Court for the Northern District of Georgia. The District Court ordered a new guilt/innocence trial with respect to the Cobb County kidnapping conviction and a new sentencing trial with respect to the Forsyth County murder conviction. 575 F. Supp. 374 (ND Ga. 1983). The Court of Appeals for the Eleventh Circuit affirmed. 734 F. 2d 526 (1984).

Potts' federal habeas petition contained several issues that had never been presented to the Georgia state courts; for the first time in his petition, he argued that he was denied effective assistance of counsel. This issue had not been raised on direct appeal or on state habeas. Indeed, in the District Court Potts moved to amend his federal habeas petition to include this new claim. The State contended that Potts had not exhausted his state remedies, citing this Court's opinion in *Rose* v. *Lundy*, 455 U. S. 509 (1982). The District Court nonetheless granted the motion to amend, stating that it was "hard pressed to see how [the State] would be prejudiced by the granting of the . . . motion." Of course, this was a wholly insufficient basis for ignoring the requirement of exhaustion of state remedies made explicit in *Lundy*. There we explained that the exhaustion requirement is designed not only to avoid prejudice to state prosecutors but also "to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Id.*, at 518.

In his federal habeas petition, Potts also argued that the trial court erred in not instructing the jury that "bodily injury" was an element of the crime of capital kidnapping. From an examination of the record lodged with this Court, it

seems clear that this issue was not presented to the Georgia Supreme Court either on direct appeal from the conviction or in the state habeas petition. Thus, Potts had not exhausted his state remedies when he sought federal habeas relief on this basis. Nonetheless, both the District Court and the Court of Appeals granted relief on this claim without giving the Georgia state courts any opportunity to review it.

Apart from the unnecessary "disruption of state court proceedings" created by this failure to require Potts to exhaust state remedies, the record that resulted is unusual in several respects. For example, the Court of Appeals embarked on an extended discussion of the meaning of the Georgia capital kidnapping statute without the benefit and guidance of a prior Georgia court construction of the statute in light of Potts' objection. 734 F. 2d, at 529–530. Obviously our decision, and the decision of the court below, would have been aided by such a construction.

The Court of Appeals also acknowledged after parsing the Cobb County jury verdict that "there is . . . some degree of uncertainty as to what the Cobb County jury intended to find with regard to the kidnapping charge." 734 F. 2d, at 530. The court nevertheless confidently declared that the jury had never found "bodily injury" because of defective instructions. The federal question presented on a challenge such as this is "whether the ailing instruction *by itself* so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even universally condemned." *Henderson* v. *Kibbe*, 431 U. S. 145, 154, and 157 (1977) (emphasis added). Of course the Georgia state courts, familiar as they are with the nuances of trial procedure in that State, are in a far better position to decide such a question in the first instance than is the Court of Appeals.

By allowing Potts to raise these issues for the first time in his federal habeas petition, the Court of Appeals also effectively circumvented sound state procedural rules that may

have been applicable. Although the trial transcript is not part of the record lodged with this Court, it seems apparent that Potts never contested that the kidnapping here did in fact end with bodily injury. After all, Mr. Priest was found shortly after Potts had kidnapped him—not merely injured, but dead with a bullet through his head—and the whole record here is filled with evidence of mayhem. Accordingly, if the trial court's instructions were in any way defective on need for a jury finding of "bodily injury," it seems extremely unlikely that Potts objected. Indeed, he may have even invited the error or made a tactical decision not to object for the purpose of diverting the jury's attention from the obvious injury that resulted. In such circumstances, the state court might well and properly have concluded that Potts was procedurally barred from raising this claim, had he been required to proceed there first. Such a conclusion could have precluded federal court review of this issue entirely since generally "if a defendant has an objection, there is an obligation to call the matter to the court's attention so the trial judge will have an opportunity to remedy the situation." *Estelle* v. *Williams*, 425 U. S. 501, 508, n. 3 (1976). This possibility was foreclosed by the Court of Appeals' hasty consideration of Potts claim. The correct course, clearly mandated by our prior opinions, was to give the Georgia state courts "first crack" at Potts constitutional objections.

"The exhaustion doctrine seeks to afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary." *Vasquez* v. *Hillery*, —— U. S. ——, —— (1986). Because the District Court and the Court of Appeals entertained a petition contrary to established law, I would vacate and remand with instructions to dismiss the petition to "allo[w] the State an initial opportunity to pass upon and correct alleged violations of [Potts'] constitutional rights." *Lundy*, *supra*, 455 U. S., at 518. We have followed essentially this procedure in other cases when we discovered that a petitioner has obtained

relief on an unexhausted claim. See, *e. g.*, *Bergman* v. *Burton*, 456 U. S. 953 (1982) (after discovering exhaustion problem, vacating and remanding for reconsideration in light of *Lundy*). Accordingly, I dissent from the Court's denial of certiorari.

JUSTICE BRENNAN took no part in the consideration or decision of this motion and petition.